SUPREME COURT OF QUEENSLAND

CITATION:	*R v MCT* [2018] QCA 189
PARTIES:	**R** **v** **MCT** (appellant/applicant)
FILE NO/S:	CA No 59 of 2017 CA No 199 of 2016 DC No 2267 of 2016 SC No 560 of 2016 SC No 562 of 2016 SC No 757 of 2015
DIVISION:	Court of Appeal
PROCEEDINGS:	Appeal against Conviction & Sentence Sentence Application
ORIGINATING COURTS:	District Court at Brisbane – Date of Conviction: 16 March 2017; Date of Sentence 17 March 2017 (Rackemann DCJ) Supreme Court at Brisbane – Date of Conviction: 23 March 2016; Date of Sentence: 1 July 2016 (Boddice J)
DELIVERED ON:	10 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	22 February 2018
JUDGES:	Sofronoff P and Morrison and Philippides JJA
ORDERS:	**1. The appeal against conviction is dismissed.** **2. The applications for leave to appeal against sentence are refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF PROSECUTOR – where the appellant/applicant was charged with multiple sexual offences against multiple members of his family – where after trial he was convicted on seven counts and acquitted on two – where during the course of the Prosecutor's closing address reference was made three times to the appellant/applicant having admitted to being a paedophile – where, in the absence of the jury, the appellant/applicant's counsel raised with the learned primary judge his concern that the use of the word "paedophile" would "powerfully resonate with the jury" – where a formal application was made to discharge the jury – where that application was refused by the learned primary judge on the basis that any prejudice could be remedied by clarification from the prosecutor following a direction from the learned trial judge –

where following such a direction, the prosecutor made a retraction – whether the learned primary judge erred and a miscarriage of justice occurred

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where the appellant/applicant was convicted of counts of indecent treatment against his biological son and daughter while they were between the ages of six and 14 years – where at the time of the trial the complainants were 50 years old and 48 years old respectively – where the appellant/applicant submitted that a significant number of inconsistencies, contradictions, improbabilities and impossibilities were evident in the witnesses testimony and as such the convictions were unreasonable – where the appellant/applicant participated in an interview with police where he made admissions – where the various inconsistencies were the object of addresses on both sides – whether the verdicts were unreasonable or insupportable having regard to the evidence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant/applicant was acquitted on count 8 and count 10 but found guilty on count 9 – where the appellant/applicant advanced the contention that this was inconsistent – where these counts were alleged to have occurred at the one time, being an occasion when the appellant/applicant showed his children a pornographic movie – whether there were rational ways in which the jury could have concluded that it was satisfied beyond reasonable doubt of the appellant's guilt on count 9, though not on counts 8 and 10

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – OTHER IRREGULARITIES – where the appellant/applicant made submissions regarding the way the trial was run, his representation and the state of the evidence – where complaints were made regarding the constant changing of the appellant/applicant's legal aid representation, that his legal representation did not pursue discovery, that they did not put forward mitigating circumstances on his behalf during sentencing and that they did not object to the unannounced calling of four Crown witnesses – where it was submitted that the learned trial judge had been biased due to his knowledge of the appellant/applicant's previous convictions of sexual offences against other members of his family – where complaints were made in relation to the conduct of the prosecution generally and in particular by using the prejudicial term "paedophile" – whether due to these

irregularities there has been a substantial miscarriage of justice

CRIMINAL LAW – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where there are two applications for leave to appeal against sentence, the first relating to sentences imposed in 2016 for offences against the appellant/applicant's wife, grandson, and adopted daughter, and the second relating to sentences imposed in 2017 for similar offences against his biological son and daughter – where the offences dealt with in 2016 actually occurred after the offences dealt with in 2017 – where the appellant/applicant pleaded guilty to a count of assault against his wife, and counts of indecent treatment against his grandson and his adopted daughter – where the offences against his adopted daughter occurred whilst they lived overseas – where he received concurrent sentences with an effective head sentence of eight years imprisonment with a non-parole period of five years and seven months – where the appellant/applicant had already served two years and seven months and this was taken into account by the learned sentencing judge – where the appellant/applicant submits that his guilty plea and cooperation with police was not credited towards the determination of his sentence – where it was also submitted that his defence counsel presented inadequate supporting argument relating to significant mitigating circumstances – where it was further submitted the appellant/applicant was told by his legal representatives that he would not receive a custodial sentence in excess of five years – whether the sentence was manifestly excessive

CRIMINAL LAW – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the offences against the appellant/applicant's biological son and daughter occurred first in time despite being dealt with in 2017, following the imposition of his sentence in 2016 – where the sentences to be imposed in 2017 were to be in respect of convictions after a trial, not on a plea of guilty – where the appellant/applicant submitted on appeal that this sentence did not take into account his co-operation and history of his own extensive childhood sexual abuse – where it was further submitted that his age and the fact that he had been the subject of harassment and assault whilst imprisoned was given no consideration – where the appellant/applicant contended that his family relied upon his support – where the appellant proffered an undertaking to assist various authorities in their efforts to curb 'burgeoning criminal activity' in return for immediate release – where the learned sentencing judge considered what would have been the appropriate sentence had the appellant/applicant been dealt

with for all matters as at the time he first went into custody – where the learned sentencing judge noted that the appellant/applicant was a serial abuser of children – where a sentence of 14 years and eight months imprisonment was imposed acknowledging that an appropriate head sentence when first dealt with would have been 18 years – where this approach was one agreed to by both sides – whether the sentence imposed on such a basis was manifestly excessive

Crofts v The Queen (1996) 186 CLR 427; [1996] HCA 22, cited
Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, cited
Lee v The Queen (2000) 112 A Crim R 168; [2000] WASCA 73, considered
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, followed
R v BBM [2008] QCA 162, considered
R v Bush (No 1) [2018] QCA 45, cited
R v CAP [2009] QCA 174, considered
R v Day (2000) 115 A Crim R 80; [2000] QCA 313, cited
R v Fanning [2017] QCA 244, cited
R v Freer and Weekes [2004] QCA 97, cited
R v H [2001] QCA 167, considered
R v KN [2005] QCA 74, considered
R v LJ [2004] QCA 114, considered
R v McLucas [2017] QCA 262, cited
R v Turnbull [2013] QCA 374, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, followed
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, cited

COUNSEL: The appellant/applicant appeared on his own behalf
J A Wooldridge for the respondent

SOLICITORS: The appellant/applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Morrison JA and the orders his Honour proposes.

[2] **MORRISON JA:** In CA No. 59 of 2017 the appellant was charged with multiple sexual offences committed against his natural son MAL and his natural daughter DAU. At the commencement of the trial he pleaded guilty to three counts of indecent dealing in respect of his daughter, when she was under the age of 14 years.[1]

[3] At the conclusion of the trial he was convicted on seven counts, and acquitted on two others. The following day he was sentenced for those offences to imprisonment for 14 years and eight months.

[4] The sentence imposed in CA No. 59 of 2017 was to be served concurrently with an existing eight-year sentence imposed on 1 July 2016. The appellant had pleaded

[1] These were counts 6, 7 and 11.

guilty to multiple sexual offences committed against his grandson, his wife and his adopted daughter. That sentence is the subject of CA No. 199 of 2016.

[5] The combined effect of both sentences was an effective period of imprisonment of about 18 years with parole eligibility, and a re-set parole eligibility date fixed at 29 November 2022.

[6] The appellant appeals against his convictions and seeks leave to appeal against the sentences imposed in CA No. 199 of 2016 and CA No. 59 of 2017.

[7] In the proceedings in CA No. 199 of 2016 the appellant was charged with offences under three indictments. Those indictments concerned offences against his wife SWS,[2] his grandson MGA,[3] and his adopted daughter ADL.[4]

[8] On the three charges of incest on indictment 757 of 2015 the appellant was sentenced to eight years' imprisonment. On the Commonwealth offences (those acts committed on someone outside Australia), the appellant was sentenced to six years' imprisonment. For those charges the parole eligibility date was set at 30 June 2019.

[9] For the offence on indictment 562 of 2016 the appellant was sentenced to two years' imprisonment. For the offence on indictment 560 of 2016 he was sentenced to 12 years' imprisonment.

[10] These reasons explain why the appeal against conviction fails and the applications for leave to appeal against the sentences are refused.[5]

[11] In these reasons I intend to deal with the appeal against convictions in CA No. 59 of 2017 first. Then I will deal with the two applications for leave to appeal against sentence in sequence, first that in CA No. 199 of 2016 as they were first in time, then those on CA No. 59 of 2017. The applications for leave to appeal against sentence need to be considered together because, as will become clearer, the sentences in CA No. 59 of 2017 were fashioned to take into account the other sentences.

Some background

[12] The appellant married his first wife when he was young. Together they had a son and a daughter. They separated in about 1990. The two children lived with the first wife after the separation, though they visited the appellant from time to time.

[13] Later the appellant married his second wife and they lived in Thailand. There they adopted a three year old girl. They moved back to Australia in about 2012.

[14] The appellant's daughter had meanwhile married and had a son. From time to time the appellant and his second wife looked after the appellant's grandson.

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2 Indictment 560/16, assault occasioning bodily harm (a domestic violence offence).

3 Indictment 562/16, indecent treatment of a child under 12 years old and under care, and also being a lineal descendent.

4 Indictment 757/15, three counts of committing an indecent act on a person under 16 and outside Australia; one count of engaging in sexual intercourse with a child outside Australia, and under care, and three counts of incest.

5 For ease of reference I intend to refer to the appellant by that name even in the applications for leave to appeal against sentence.

[15] The offences committed by the appellant against his own son and daughter commenced when they were quite young, about five or six years old. Those offences were earlier in time than those committed by the appellant against his adopted daughter, grandson and second wife.

[16] The appellant's offending involved a number of his family members. To assist in following the reasons below they are:[6]

(a) his first wife, **FWJ**;

(b) his daughter, **DAU**;

(c) his son, **MAL**;

(d) his second wife, **SWS**;

(e) his grandson, **MGA**; and

(f) his adopted daughter, **ADL**.

Appeal against convictions in CA No. 59 of 2017

[17] As will become apparent there were voluminous submissions from the appellant. Much of them were not properly focussed and raised matters that revealed a fundamental misunderstanding about criminal trial processes. Much of them overlapped the two proceedings. Dealing with them has therefore been made more difficult than it needed to be. In the end not all points raised by the appellant need be considered; if they are not it is because they do not rise above those dealt with in these reasons.

Schedule of offences in CA No. 59 of 2017

[18] The offences against the appellant's son MAL and daughter DAU, the verdict in each, and the sentence imposed on each are set out below in the following table:

Count	Offence	Outcome
Count 1	Rape of DAU; between 5 July 1972 and 4 July 1973	Convicted by the jury – 14 years and 8 months' imprisonment
Count 2	Indecent treatment of MAL, under 14 years; between 29 July 1973 and 1 January 1977	Convicted by the jury – 3 years' imprisonment
Count 3	Indecent treatment of DAU, then under 12 years; between 29 July 1973 and 1 January 1977	Convicted by the jury – 2 years' imprisonment
Count 4	Attempted carnal knowledge of MAL; between 29 July 1973 and 1 January 1977	Convicted by the jury – 5 years' imprisonment
Count 5	Rape of DAU; between 5 July	Convicted by the jury –

[6] Other witnesses to be referred to are DAU's husband, a preliminary complaint witness, LMR, and an in-law, BGW.

	1976 and 4 July 1978	14 years and 8 months' imprisonment
Count 6	Indecent treatment of DAU, then under 14 years; between 5 July 1976 and 4 July 1978	Plea of guilty – 18 months' imprisonment
Count 7	Indecent treatment of DAU, then under 14 years; between 5 July 1976 and 4 July 1978	Plea of guilty – 18 months' imprisonment
Count 8	Indecent treatment of MAL, then under 14 years; between 5 July 1977 and 4 July 1979	Acquitted
Count 9	Indecent treatment of DAU, then under 14 years; between 5 July 1977 and 4 July 1979	Convicted by the jury – 2 years' imprisonment
Count 10	Indecent treatment of DAU, then under 14 years; between 5 July 1977 and 4 July 1979	Acquitted
Count 11	Indecent treatment of DAU, then under 14 years; between 5 July 1980 and 4 July 1981	Plea of guilty – 12 months' imprisonment
Count 12	Indecent treatment of DAU, then under 14 years; between 5 July 1981 and 4 July 1982	Convicted by the jury – 12 months' imprisonment

Ground 1 – failure to discharge the jury following closing address

[19] This ground concerned comments made during the course of the Prosecutor's closing address in relation to the appellant. At three points in his address the Prosecutor referred to the appellant as having admitted to being a paedophile. The three comments were as follows:

(a) "Now, here we have a man who admits to being a paedophile. He tells you about his uncontrollable urges that he has."[7]

(b) "Now, what else do you have to support [DAU]? Well, of course there's [the appellant's] statement that he's a paedophile to the police, that he maintained a sexual relationship with his daughter for almost a decade …";[8] and

(c) "We also know that he has confessed to being a paedophile, not interested in 30 year old women, only children, he has got these uncontrollable urges that he has got no power over, no choice against he says."[9]

[20] At the conclusion of his address the appellant's trial Counsel, in the absence of the jury, raised his concern about the repeated assertion that the appellant was a paedophile. Discussion following during which the learned trial judge indicated some matters that the Prosecutor should clarify to the jury. In the course of that,

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7 Address p 3, line 4.
8 Address p 10, line 27-29.
9 Address p 14, line 13-16.

a formal application to discharge the jury was made on the basis of the Prosecutor's suggestion that the appellant "is a person with a particular character, namely he's a paedophile." It was submitted that the term "paedophile" would continue to "powerfully resonate with the jury" in a way that could not be remedied by direction or clarification by the Prosecutor.[10] The learned trial judge refused to discharge the jury on the basis that the use of the term was unfortunate but any prejudice could be remedied by clarification from the Prosecutor, followed by a direction from the learned trial judge.[11]

[21] One difficulty for the appellant in respect of this point is that his description of himself to the police during the interview was that he had uncontrollable urges of a sexual kind in relation to young girls. The jury had heard that interview.

[22] During the interview the appellant described DAU as being "the initiator" on most occasions when she would jump into bed with him in the mornings. Initially he described that conduct as "it went as far as fondling", with each of them fondling the other.[12] That conduct was said to have commenced when DAU was "probably six or something like that, seven."[13] The appellant agreed that there was sexual activity between the two of them, though he denied that there was ever any penetrative sex.[14]

[23] The appellant told the police that he was not trying to reduce his penalty "because I really don't want to ever be released, you know … or not, not in the short term anyway."[15]

[24] As the interview progressed, the appellant conceded that the sexual activity went beyond fondling. He agreed that it included DAU giving him oral sex while he was in the car[16] and on one occasion just after he had had a shower.[17] He put that occasion as being when DAU was about six years old.

[25] He also agreed it was possible that he had made DAU masturbate him while in the bath.[18]

[26] Shortly thereafter the appellant explained to the police that it was not the case that he wanted to get out of responsibility for what he had done because:

> "Appellant: Okay. But I, what I do want to do, and this, [INDISTINCT] there's something that is desperate for me to do … For myself, okay, is to find out why this is happening. Because it's happened all my life since I was a little boy."[19]

[27] He then explained what he was referring to. It was that he feared some hereditary influence:

> "Appellant: Who taught? Nobody taught anybody to do at this age. And this has always been the case. And, … I

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10 Appeal Book 59 of 2017 (**AB**) 117-118.
11 AB 118 line 44.
12 AB 280 lines 44-60.
13 AB 281 line 12.
14 AB 281 lines 30-46.
15 AB 282 lines 8-15.
16 AB 282-283.
17 AB 283.
18 AB 284.
19 AB 287 lines 47-55.

> want to know why. I want to find out why. And I want to talk to the lawyer first. … I'll cooperate with you as much as you want. And I will never, you put me on the stand if you like. … And if you tell me to say something that it was the truth, I'm not going to dispute any part of it. … But I want to find out why. … Okay? And I want to talk to the lawyer first to find out how I can find out why. … Okay. This is very important to me. And that's why, look, you mind (sic) think this is a little bit silly, but I'm pleased that this situation, but pleased for me that this situation has developed to this point … Where, where it's finally over."[20]

[28] He then went on to explain the urges he felt:

> "Appellant: And, and that's what I needed also. But as I told you before, the power that … is within this whatever you want to call it, condition or … or whatever it is, its power is greater than me.
>
> Police: Okay.
>
> Appellant: And it has been greater than, always been.
>
> Police: Sorry, you lost me there. You talking about the, this compulsion to … sexual abuse?
>
> Appellant: Yeah that, -
>
> Police: That's the power you're talking about?
>
> Appellant: That's, that's exactly right."[21]

[29] The appellant went on to say he, himself, identified that he posed a risk to the community:

> "Appellant: … it has always been this way. It's, it has a power. I don't, I have no control … Over it. And, um, this is why I told you I'm relieved. That I'm here and the rest of the communities out there. … I mean it doesn't concern me at all with adults. I have no, I have no really … total attraction to beautiful women who are already thirty years of age. I mean the (sic) could walk past a dozen at a time and it, and it wouldn't you understand what I mean?
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> …
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> Police: But children is different?
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> Appellant: That's correct. Young, no, not children specifically, but girls."[22]

[30] The appellant went on to tell the police that he needed to discuss matters with a specialist first, that his grandfather had had sexual relations with the daughters of

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20 AB 288.
21 AB 290.
22 AB 290-291.

his family and that is why he (the appellant) needed to discuss with a specialist "to find out before we go … right through a whole big process".[23] He explained that he wanted to know "where do they get this from?" and whether it was hereditary, "kind of passing through … the generation".[24] He then addressed the power over him in this way:

> "Appellant: I'm saying that I don't choose it at all. … I'm saying that I don't have power over this. … [o]nce I start. And … it's just that … it doesn't matter if there is … a risk that I'm [going to] get my head cut off."[25]

[31] He then described that being at risk did not have an influence on him and that the power was "totally uncontrollable as far as I'm concerned", and "it dominates my life".[26]

[32] The Crown Prosecutor then continued his address saying this:

> "Now, finally, I used the word paedophile a couple of times when I was talking about [the appellant]. I'm not trying to say that there's any clinical diagnosis of [the appellant]. Of course, that would be required to reach that definition. What I'm talking about is his admission to offending against his daughter between when she was at least six to 13, perhaps even younger, on his own admission and I take you to what he said to the police. He said this:
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> [here follows the passage at paragraph [29] above]
>
> So that was my reference to him to calling him a paedophile and specifically in this case I'm alleging or relying upon what he says about the offending against his daughter between when she was at least six to 13."[27]

[33] After the Prosecutor's address had finished the learned trial judge addressed the jury on the question of delay and whether it had affected the fairness of the trial on two issues, and then on the use of the term "paedophile":

> "And thirdly, it was wrong of the prosecutor to use the term paedophile which has a clinical meaning. There's no expert evidence here about him being clinically diagnosed. It was the prosecutor's erroneous short-hand reference to the evidence you're speaking of, what [indistinct] I'll give you some more directions about this later on, is the interest he had in his daughter. … it would be completely wrong of you to say, 'Well, we're going to brand this person a paedophile – which is obviously a term that has quite a fair [indistinct] emotiveness attached to it – and therefore, he must've done all these things'. It will be relevant for you to have regard to evidence of his sexual interest in his own daughter, the complainant here and indeed, of the son. But the use of that term was wrong and

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23 AB 292 line 20.
24 AB 293.
25 AB 293 lines 30-40.
26 AB 294 lines 3-15.
27 Transcript of addresses, pp 14-15.

> shouldn't have been used [indistinct] can you please put it out of your minds."[28]

[34] In the course of the summing-up the learned trial judge returned to the evidence of admissions by the appellant.[29] In addition a warning was given to the jury about using such evidence as propensity evidence. Specifically the learned trial judge directed the jury about the use they could make of uncharged acts:

> "If you are satisfied … that any other alleged incidents did occur it would be quite wrong to reason that the defendant is generally a person of bad character and for that reason must have committed the other offences charged. The evidence has been led for the purpose of showing that the defendant had a sexual interest in the complainant and was willing to give the effect to that interest and therefore it is more likely that the defendant committed the offences charged against him with respect to that complainant.
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> And that is what I was saying before, that when we corrected the Prosecutor after his address … and he clarified to you that he is really relying upon the conduct against the complainants and the sexual interest in the complainants. It would be quite wrong for you to conclude that the defendant is someone with a tendency to commit this type of offence and therefore more likely to have committed the charged offence or offences. The evidence, as I said, has come before you for a limited purpose only.[30]
>
> Further, you should not reason that the defendant has done things equivalent to or similar to the offences charged on other occasions, and on that basis should be convicted of what has been charged even though the particular offences are not proved beyond a reasonable doubt. You must be satisfied about the particular offences that are charged."[31]

[35] The definition of paedophilia is: "an abnormal, especially sexual, love of young children", and the "sexual love directed to children";[32] or "sexual attraction in an adult towards children".[33] A "paedophile" is defined as: "A person who is sexually attracted to children";[34] "a person who displays sexual desire directed towards children, usually or pre-pubertal or early pubertal age";[35] and "an adult who engages in sexual activities with children".[36]

[36] On any of those definitions the appellant was a paedophile, on his own admission as to the overwhelming and uncontrollable urges he felt towards some children. The jury heard and saw the police interview, in which the appellant gave the graphic descriptions of his inability to control, let alone even overcome, the urges he had for young girls. In the circumstances, the Prosecutor's description of him as a paedophile, whilst it might have been unfortunate in other circumstances, was entirely accurate.

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28 AB 119-120.
29 AB 127 to AB 128 line 14.
30 AB 131 lines 33-47.
31 AB 131 line 33 to AB 132 line 4.
32 Australian Concise Oxford Dictionary (1987).
33 Macquarie Dictionary (2nd Revision, 1991).
34 The Oxford English Dictionary (2015).
35 Butterworths Australian Legal Dictionary (1997).
36 Macquarie Dictionary (2nd Revision, 1991).

In my respectful view the learned trial judge was right to take the view that the Prosecutor's retraction and explanation, accompanied by an appropriate direction by the judge himself, would be sufficient to counter any possible prejudice. The jury, having heard and seen the interview, could hardly have been improperly influenced, or distracted from their task, by what the Prosecutor said. The greatest impact would have been from the appellant's own admissions.

[37] The correct approach to be taken by an appellate court when complaint is made about a trial judge's refusal to discharge a jury is that set out in *Crofts v The Queen*:[37]

> "No rigid rule can be adopted to govern decisions on an application to discharge a jury for an inadvertent and potentially prejudicial event that occurs during a trial. The possibility of slips occurring are inescapable. Much depends upon the seriousness of the occurrence in the context of the contested issues; the stage at which the mishap occurs; the deliberateness of the conduct; and the likely effectiveness of a judicial direction designed to overcome its apprehended impact … [M]uch leeway must be allowed to the trial judge to evaluate these and other considerations relevant to the fairness of the trial, bearing in mind that the judge will usually have a better appreciation of the significance of the event complained of, seen in context, than can be discerned from reading transcript.
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> Nevertheless, the duty of the appellate court, where the exercise of discretion to refuse a discharge is challenged, is not confined to examining the reasons given for the order to make sure that the correct principles were kept in mind. The appellate court must also decide for itself whether, in these circumstances, the result of the refusal to discharge the jury occasioned the risk of a substantial miscarriage of justice. In other words, can the appellate court say with assurance that, but for the admission of the inadmissible evidence, the conviction was inevitable?"

[38] Normally the fact that the Prosecutor referred to the defendant as a paedophile would be quite prejudicial. However, here the entire case revolved around the appellant's sexual conduct towards children of a relatively young age. More importantly the comments were made in closing address, sometime after the jury had heard and seen the appellant's interview with the police, where he admitted to uncontrollable sexual urges towards children, and to putting them into effect with at least his daughter. There can be little doubt that the comments were deliberate but they were immediately corrected with the Prosecutor saying that he was wrong to do so. That was followed in the summing-up by the learned judge, with a direction to disregard the comments and a warning against reasoning by way of propensity evidence.

[39] In my respectful view, the learned trial judge in this case was in a better position to assess the significance of the Prosecutor's comments than this court can, reading simply from the transcript of what was said.

[40] Intemperate and improper addresses by a Crown Prosecutor can undoubtedly result in a miscarriage of justice and lead to the setting aside of a conviction. So much

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37 (1996) 186 CLR 427 at 440-441 (internal citations omitted); [1996] HCA 22.

was recognised in *R v Freer and Weekes*.[38] The issue is usually whether there has been a real risk that the remarks wrongly influenced the verdict, thus resulting in an unfair trial. As put in *R v Freer and Weekes* the issue is whether the trial process was unfair, or the appellant was denied a chance of an acquittal otherwise open, taking into account both the Prosecutor's remarks and the later directions by the judge.[39]

[41] As was observed in *R v Day*[40] considerable care is necessary to ensure that jury verdicts are not based upon prejudice, sympathy, fear or irrelevant emotion, and numerous statements may be found in the cases about the undesirability of emotion.

[42] One indicator that the jury were not distracted from their proper task (that of assessing each charge according to the evidence that related to that charge, and satisfying themselves beyond reasonable doubt of guilt on that count) is that the jury acquitted the appellant on counts 8 and 10.

[43] I am unpersuaded that the reference to the appellant as a paedophile, as unfortunate though that was, produced an unfair trial or denied the appellant a chance of acquittal. This ground fails.

Ground 2 – unreasonable and insupportable verdicts

[44] An examination of this ground of appeal requires an independent review of the whole of the evidence at the trial. The appellant's approach was a broad-scale attack on the veracity of the witnesses (particularly DAU and MAL), and to highlight the significant number of inconsistencies, contradictions, improbabilities and impossibilities which, he said, were evident in the evidence in the witnesses testimony.

Evidence of DAU

[45] Formal admissions were made as to the date of birth of each of MAL and DAU. MAL was born on 30 July 1966, and therefore between six and ten years old at the time of offending where he was the complainant. By the time of the trial MAL was 50 years old. DAU was born on 4 July 1968 and therefore between four and 15 years of age in respect of the offending where she was complainant. She was 48 years old at the time of the trial.

[46] At the start of the trial the appellant entered pleas of guilty to counts 6 and 7, each of which was a count of indecent treatment of DAU who was then under 14 years old.

DAU's evidence in respect of count 1 (rape)

[47] Her detailed evidence followed a general statement that the appellant would get in the bath with her, make her wash him and wash his penis, and he would touch her vagina.[41] She then said this as to the circumstance of Count 1:

> "And I also remember at that house where he first penetrated me. It was just before my aunty's wedding, because I was flower girl for her wedding, so I remember the time pretty well. He asked me to come into his bedroom after my mum had gone out for the night; she

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38 [2004] QCA 97 at [97].
39 *R v Freer and Weekes* at [93].
40 [2000] QCA 313 at [28].
41 AB 36 lines 18-20.

> went to Weight Watchers' meetings at night. And he asked me to climb into bed with him and give him a cuddle, and I had a nighty on with pants underneath, and he took the pants off and climbed on top of me, and I remember I didn't really understand what he was doing, but he stuck his penis inside of me, and I remember screaming a lot, and I remember it really hurt, and it felt like it was burning, and I screamed a lot and was crying and told him to stop, but he did it two more times, and I was still screaming, and he finally stopped, and he told me to go back to the bedroom, and I shared a bedroom with my brother at that time, and he told me to tell my brother … that I was crying because he'd got a splinter out of my finger. I don't remember much more at that house. I know he often touched me there, but I don't remember anything else more specific."[42]

[48] She added that the appellant told her not to tell anybody and if she did she would "get put in a home".[43] She gave general evidence of the occasions upon which she said they would be in the bath together. This occurred between the ages of four and six and would involve each of them being naked in the bath. She recalled that his penis would get hard when she touched him.

[49] Her evidence was that one of the reasons the events just before the wedding remained in her mind was because she was a flower girl and had her ears pierced for the event. She recalled her father chasing her around the house whilst playing, and she ran through a lace curtain and tore an earring. She said she could remember yelling and screaming at him and saying it was his fault.[44]

[50] She gave evidence that when she was in school in about grades six and seven she told a friend, LMR, about having been raped and molested. She could not recall the conversation but remembered telling LMR "because of an incident that happened at school".[45]

[51] She also recalled telling FWJ when she was sixteen and had fallen pregnant. She could not recall specifically what she said to FWJ, except that the appellant had abused her and she did not want him to touch any child that she had.[46] She also told her husband that the appellant had made her masturbate him, perform oral sex, that he had tried to rape her, and he had penetrated her.[47]

[52] In cross-examination it was put to her that she was wrong about the timing of FWJ's attending Weight Watchers', and that she was wrong about where the family lived from time to time. Specifically it was put to her that her evidence about Count 1 concerned events which had never happened, and that the appellant had never penetrated her vagina either with his penis or his fingers.[48] She rejected those assertions and described how she went back into the bedroom, sobbing and crying and told MAL that the appellant was trying to get a splinter out of her finger. She could not recall if MAL was actually awake or not.

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42 AB 36 lines 20-34.
43 AB 36 line 44.
44 AB 37 lines 27-37.
45 AB 48 lines 30-43.
46 AB 48-49.
47 AB 49-50.
48 AB 52 lines 5-13.

[53] She said that the incident where she had torn her earring was not immediately before or after the occasion of an assault, but "it all happened very close together at that stage".[49] It was put to her, and she rejected, that the appellant had never told her not to tell anyone or she would be put in a home.[50]

Count 5

[54] DAU recounted one occasion when she and the appellant were in the front of the car at night time. She said:

> "I don't know where we were headed, but it was night-time, and I do know that … he pulled off the main road and went [on to] … a side road or something, and … I was in the front seat, in the passenger seat, and he climbed over into the front passenger seat from driving and tried to penetrate me again, putting his penis in my vagina, but I was the same as the first time, because it really hurt, and I screamed a lot, and I was crying, and he tried another couple of times to do it, and then he stopped because I was screaming, telling him not to do it."[51]

[55] She said that his penis went into her vagina on that occasion. She thought that she was around six years old and that it was before they moved to Narangba.

[56] In cross-examination it was put to her that such an incident never occurred, and she was asked about the type of car involved. It was suggested that it was not possible for the appellant to do what she had said because of the size of the car and the shape of the seats. She was also cross-examined about her description of the event, referring to the appellant having tried to penetrate her, but she reiterated that he was able to do so.[52]

Counts 2-4

[57] DAU gave evidence that at a time when she and her brother were living at Narangba the appellant would visit them at their grandmother's house. After her parents had separated, she and MAL were living with their grandmother. Every fortnight she and MAL would visit the appellant at his house at Narangba. DAU did not give any evidence to support counts 2-4, the only evidence in respect of those counts coming from MAL.

Counts 8-10

[58] DAU's evidence in respect of these counts was relatively short. She described an occasion after her parents had separated and she and MAL were living with their grandmother. At that time they would see the appellant at his house at Narangba every fortnight. On one of those occasions she said she could recall the appellant playing a pornographic movie. She said that the appellant "got my brother and I to undress and lay on the bed with him and watch the movie".[53] She said:

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49 AB 53 line 14.
50 AB 53.
51 AB 38 lines 33-40.
52 AB 54 lines 17-23.
53 AB 41 line 5.

> "I remember bits and pieces of that night - about him having oral sex with me and my brother. He started, I think, with me and then got me to perform on him while he was performing oral sex with my brother."[54]

[59] She said she asked to go out and get a drink and stayed out of the room as long as she could get away with it. Eventually she went back into the bedroom:

> "I'm not 100 per cent sure what happened. My brother and him were in a different position from when I left. When I left, my father was giving him oral sex, as well as my brother giving him oral sex.[55] So when I left, they were in a different position, so I don't know if that continued or not, but … I think it continued once … I came back in, but I don't remember very well after that."[56]

[60] She went on to say she thought she was performing oral sex with the appellant but she could not remember 100 per cent of what happened after that.

[61] In cross-examination it was put to her, and she denied, that the appellant had never shown her a pornographic movie. Similarly, it was put to her, and she denied, that the appellant did anything to MAL when she was present, and more particularly, there was never any occasion when she and MAL were together.[57] Furthermore, there was never an occasion when the appellant behaved in an indecent way towards MAL whilst she was present; she denied that assertion.[58]

Count 12

[62] DAU's evidence in respect of count 12 was quite short. She said:

> "There was one time where he was taking photographs of me. There wasn't anyone else in the house, and he got me to undress and was taking close-up photos of parts of my body and I think it was with a Polaroid camera – one of those ones that … photo comes out …"[59]

She said she didn't think she had any clothes on and the photographs were mostly close-ups of her vagina. She was about 12 to 13 at the time.

[63] In cross-examination it was put to her, and she denied, that the appellant had never taken any indecent photographs of her.

Evidence of MAL

[64] MAL's evidence only supported counts 2 and 4. He said that he had suffered abuse at the hands of the appellant, which he described in this way:

> "There was one occasion where he instructed myself to have sex with my sister, and, as part of that, he put me on my hands and knees and proceeded to penetrate my – that's when I responded with, 'Ow.

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54 Count 9 was DAU performing oral sex on the appellant, and count 8 was the appellant performing oral sex on MAL.

55 This was the subject of count 10.

56 AB 41 lines 22-28.

57 AB 54.

58 AB 54 lines 29-34; AB 55 lines 39-42.

59 AB 44 line 45 to AB 45 line 2.

> That hurts'. That was the only occasion where he proceeded to do that. … [He was using] his penis. … He was instructing – or, in his words, teaching – me how to treat a woman, and he's showed that I should have sex with my sister. And when I was crying, he called me a sook because that's what all boys do, is have sex, and I don't agree with that. … My sister was lying on her back, and he instructed that I should put my penis inside her, but I don't recall that actually happening. I just recall … the shame."[60]

[65] His evidence was that he was lying on top of DAU and the appellant was on the bed with an erect penis. None of them were wearing any clothes. He said he could not recall what the appellant was doing in particular, "but I do recall asking what the white stuff was coming out of his penis, and he responded with 'semen' and it was after that that he had sex with me".[61]

[66] He said that the appellant told him that if he told anybody he would be put in a boys' home.[62]

[67] In cross-examination he was asked various questions about the sequence of houses in which they lived and when. It was put to him, and he disagreed, that the appellant had never directed him to have sex with DAU, nor had the appellant tried to put his penis in MAL's anus. He said that the occasion which he had referred to in his evidence was the only time that the appellant ever did anything sexual involving him.[63]

Evidence of SWS

[68] SWS's evidence was confined to things the appellant had told her about DAU. With the agreement of Defence Counsel the questions were asked in a leading way in this passage:

> "All right. He said, '[DAU] came into my bed and tried to use her mouth on my teddy'?---Yes.
>
> And what does 'teddy' mean?---The penis.
>
> Teddy was a nickname for a penis?---Yes.
>
> All right. He also told you, 'I kissed [DAU] on her Suzie'?---Suzie is the vagina."[64]

[69] SWS also said that after they returned to Australia the appellant wrote her an email explaining why he did things to DAU. He told SWS, "I told [DAU] I went and saw a monk to fix myself".[65]

[70] There was no cross-examination of SWS.

Preliminary complaint evidence

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60 AB 57 lines 29-46.
61 AB 58 lines 1-9.
62 AB 58 line 25.
63 AB 63 lines 1-2.
64 AB 64 lines 8-15.
65 AB 64 line 33.

[71] Preliminary complain evidence was given by three witnesses, DAU's husband, FWJ and LMR.

[72] DAU's husband said that in about 1990 DAU told him that the appellant had done things to her "through her younger years, from when she was young, probably about five or six".[66] The things she mentioned were that the appellant had touched her and made her touch him in places, and also tried to have sex with her. The touching was in the form of masturbation and the touching by him was in the genital area, and oral sex. He said he could recall that she mentioned an occasion which involved MAL and "a lot of … oral sex and touching".[67]

[73] In cross-examination he confirmed that he had been told by DAU that the appellant would make MAL perform oral sex on him. Further, that the appellant would try to penetrate DAU's vagina with his penis.[68]

[74] FWJ was married to the appellant and was the mother of DAU and MAL. She said DAU had talked to her about being sexually abused by the appellant. She said the occasion was when DAU was about 14 or 15 and was triggered when MAL told her that DAU was upset. She sat down on the bed with DAU and "she said that her father had been interfering with her … sex and raping her and things like that".[69] She could not remember exactly what had been said but could remember comforting her and calming her down. DAU told her that the abuse had started when she was about four or five.

[75] In cross-examination she was confronted with what she had said in a previous police statement, which was to the effect that the appellant had been touching DAU and interfering with her since she had been young. She said that DAU did not include information about where the touching or interfering had happened, nor how often, nor whether she had mentioned anything about MAL.[70]

[76] LMR said that she was a friend of DAU at primary school and when she was about ten DAU told her that the appellant had been sexually abusing her. Her account was:

> "I asked her what happened, and she said her father came into her room, and he raped her, and I said, 'what happened?' And she said that he came into her room, it was at night time, he got on top of her, and he raped her. And I asked her what happened afterwards. She said she went in to the bathroom and locked the door, and she cried, and cried, and cried, and she was washing the blood from her, and she said she just cried, and cried, and cried, and cried."[71]

[77] In cross-examination she said that was the only time she and DAU had spoken about what the appellant had done. She was not told anything that would have helped to work out the timeframe. She confirmed that the conversation included that DAU had washed blood off her lower parts whilst in the shower.[72]

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66 AB 69 lines 31-33.
67 AB 69 line 44 to AB 70 line 24.
68 AB 70 lines 37-41.
69 AB 75 lines 10-11.
70 AB 77.
71 AB 82 lines 21-27.
72 AB 83.

The appellant's record of interview

[78] The appellant's record of interview was tendered in evidence.[73] The recording of it was played to the jury. Relevant features of it have been mentioned elsewhere in these reasons: see paragraphs [22] to [31] above.

[79] In his police interview the appellant said, in relation to DAU:

(a) there was never any pressure and DAU was, in fact, the initiator on most occasions; she would get into bed and cuddle with him;

(b) the cuddling went as far as fondling with each other, and DAU would take delight in doing that;[74]

(c) that conduct commenced when she was about six or seven;

(d) on numerous occasions DAU was the initiator but if she said stop then they would do so;[75]

(e) there was sexual activity between he and DAU but not to the extent that there was intercourse; he denied any penetrative sex;[76]

(f) he could recall DAU giving him oral sex on one occasion in the car;[77]

(g) DAU was the initiator on a lot of occasions, and he could recall one occasion when he had had a shower and DAU took his towel off and performed oral sex on him;[78] she was about six at the time;[79]

(h) he could not recall an incident when he and DAU were in the bath and he used her hand to masturbate himself, though he said it was possible;[80]

(i) the sexual conduct between he and DAU continued up until he and FWJ separated, and it was rare after that.[81]

[80] In addition, as mentioned earlier, the appellant entered a plea of guilty to counts 6, 7 and 11. Count 6 was particularised as an occasion when she was in bed and he put his fingers in her vagina. DAU gave evidence of such an occasion.[82] Count 7 was particularised as an occasion when she was in bed and the appellant licked her vagina. DAU gave evidence of that occasion.[83] Count 11 was particularised as an occasion when he touched her vaginal area. DAU gave evidence of that occasion.[84]

Discussion

[81] In a case where the ground is that the conviction is unreasonable or cannot be supported having regard to the evidence, *SKA v The Queen*[85] requires that this Court

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73 Exhibit 3.
74 AB 280-281.
75 AB 281.
76 AB 281.
77 AB 283 line 10.
78 AB 283.
79 AB 283-284.
80 AB 284.
81 AB 284-285.
82 AB 40 lines 12-15.
83 AB 40 lines 15-19.
84 AB 45 lines 11-19.
85 (2011) 243 CLR 400 at [20]-[22]; [2011] HCA 13; see also *M v The Queen* (1994) 181 CLR 487 at 493-494; [1994] HCA 63.

perform an independent examination of the whole of the evidence to determine whether it was open to the jury to be satisfied of the guilt of the convicted person on all or any counts, beyond reasonable doubt. It is also clear that in performing that exercise the Court must have proper regard for the pre-eminent position of the jury as the arbiter of fact.

[82] In *M v The Queen* the High Court said:[86]

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

[83] *M v The Queen* also held that:[87]

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence."

[84] Recently the High Court has restated the pre-eminence of the jury in *R v Baden-Clay*.[88]

[85] One feature of the appellant's interview with the police was his explanation for why DAU was upset and why it was that she had made the complaints to the police. His explanation lay in this passage:

> "APPELLANT: Ah, everything that, that has come up here, regardless whether it's justifiable or not, has stemmed in my opinion, **not from [DAU] being so terribly upset about what happened** …

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86 *M v The Queen* (1994) 181 CLR 487 at 493; internal citations omitted. Reaffirmed in *SKA v The Queen* (2011) 243 CLR 400.

87 *M v The Queen* (1994) 181 CLR 487 at 494.

88 (2016) 258 CLR 308 at [65]-[66]; [2016] HCA 35; internal citations omitted.

> [b]ut because she was so terribly upset about the fact that we had [the adopted daughter]."[89]

[86] In the context of what he said about specific incidents (see paragraph [79] above), that was an admission, in my view, as to sexual abuse against DAU.

[87] On his own admission that abuse continued from when she was six until after he had separated from FWJ, which was when DAU was about nine.[90] However, after separation, it became rare, occurring "not very often at all".[91] As is evident from that response, it did not cease.

[88] It can be seen that DAU received general support from several sources, in terms of credibility and reliability as a witness. One source was the fact that she had complained to others about the conduct. Another was the fact that several of her alleged incidents were the subject of express admission, namely as to counts 6, 7 and 11. Counts 6 and 7 occurred when she was between eight and nine years old, and count 11 occurred when she was 12 to 13 years old. Yet another was the appellant's admission of not only his sexual interest in, but sexual conduct towards, DAU between the ages of six and nine, and then to a lesser extent when she was older after he and FWJ separated. The admissions extended to conduct which included fondling, oral sex on a lot of occasions, and possibly masturbation in the bath. Yet another was the evidence of SWS, as to the admissions by the appellant. And yet another again was the support from MAL's evidence, limited though it might be.

[89] Notwithstanding the case that the appellant wished to urge on appeal, and (as he contended) at trial, namely that DAU had fabricated a dishonest account, that was not a case put to DAU in evidence. One can see good reason for that, given the appellant's own admissions of sexual misconduct in relation to her. It is difficult to imagine that competent Counsel would have gone out on such a limb, in the face of that record of interview and the admissions given by SWS.

[90] The appellant spent considerable time, particularly in witness submissions, exploring what was said to be inconsistencies, contradictions and inherently unlikely events, all to make the ultimate submission that the evidence against him rendered the verdict unsafe and unsatisfactory. The appellant pitched his submissions at a higher level, contending that the evidence from MAL and DAU was fabricated and the product of dishonesty on their part.

[91] The instances identified by the appellant are too many to be dealt with individually. I intend to deal with them in general categories.

Contradictions

[92] The following summary will serve to indicate the nature of the contentions:

(a) imperfect memory on the part of DAU; in respect of this category the appellant pointed to DAU's inability to remember precisely which houses they lived in, and in what sequence, when she was between the ages of four and seven; he also pointed to DAU's identification of one offence having

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89 AB 279 lines 49-57; emphasis added.
90 AB 35 line 31.
91 AB 285 line 1.

happened at a particular house, when the appellant contended that they did not move to that house until later;

(b) inconsistencies in DAU's evidence; one example here was her account that the first occasion of penetration caused her to scream and cry, and it was painful, whereas she was unable to remember accurately what age she was when the first occasion of penetration occurred;

(c) improbabilities in DAU's evidence; in this category was her evidence that on the first occasion of penetration the appellant threatened her that he would "put her in a home" if she told anyone; the point being made was that such a threat to a four year old child would be meaningless;

(d) contradictions and inconsistencies in DAU's evidence generally; an example here was her differing accounts of the occasion when she caught one of her earrings on a lace curtain and whether she yelled at the appellant on that occasion because of her anger about having been touched;

(e) inconsistencies between DAU's evidence and the evidence of those as to preliminary complaint; an example of that was whether the conversation in the preliminary complaint included the word "rape" as opposed to something else; another example was the level of detail told to the preliminary complaint witnesses;

(f) inconsistencies on DAU's evidence as to whether she visited the appellant after she was an adult, and whether she would leave her son, MGA, with the appellant and SWS after they returned from Thailand;

(g) inconsistencies in the evidence of LMR, whose evidence was asserted to have been "apparently invented for the occasion";[92] this focused on the degree of detail in the preliminary complaint evidence, when compared to that of DAU, as well as differences between the two accounts;

(h) inconsistencies in the evidence of FWJ; this was submitted to be "uncertain", "inaccurate" and "inconsistent" with other evidence; this identified lack of specificity was in remembering where the family lived and when, and at what time various activities occurred; further, her inability to remember precisely what was said on the occasion of DAU complaining to her; her inability to remember precisely what she had told the police on the first occasion of speaking to them, and the absence in her account to them of the word "rape"; her general lack of good memory;

(i) inconsistencies in the evidence of DAU's husband; these were submitted to be so severe that they evidenced bias against the appellant;[93] the focus of this attack was on the differences in his account of the complaint made to him by DAU;

(j) inconsistencies, contradictions and impossibilities in the evidence given by MAL; once again this focused on MAL's inability to remember precisely where they lived at what time, and how old he was at that time; attention was drawn to various differences in his account of the offending conduct in which he was involved, and in particular differences between his evidence and the

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92 Affidavit #3 paragraph 43.

93 Affidavit #3 paragraph 60.

evidence of DAU in respect of the occasions concerning offences in which they were both involved; the difference between MAL and DAU was said to support the appellant's contention that the events never happened;[94] the appellant went so far as to suggest that the "innumerable" inconsistencies and contradictions supported his contention that there was "a certain level of mutual collaboration involved" and that the collaboration "was initiated by [DAU] after she discovered the existence of her – previously unannounced – adopted step-sister [ADL]";[95] and

(k) two significant aspects of MAL's evidence in cross-examination, namely:

i. his inability to remember when and where a particular move from one house to another was made; and

ii. that there was no "second threesome" event;[96] and

(l) inconsistencies and contradictions in the evidence of DAU; a central focus of the appellant's submission was to highlight differences between her evidence as to offences which occurred in the car, and his account of them in his police interview;[97] in addition, the appellant pointed to the lack of timely mention of count 5 (rape) to any of the preliminary complaint witnesses; the appellant also referred to differences in her evidence about the use of a Polaroid camera to take sexually explicit photographs of her, highlighting that a "glaring example of her propensity to tell outrageous lies" was her reference to the use of a "tripod setup" for the Polaroid camera, when (the appellant asserted) there was no facility on a Polaroid camera to use a tripod.[98]

[93] The difficulty with the appellant's approach is that not only would the various inconsistencies and contradictions in the evidence would have been obvious to the jury, they were also the subject of addresses on both sides as well as in the summing-up of the learned trial judge. True it is that the appellant probably descended to a greater level of detail in his minute scrutiny of aspects of the evidence, than was ever the case at the trial, but that is not to the point. The appellant's approach served to demonstrate the difference between the course taken by experienced criminal advocates at a trial, and that which might be pursued by an inexperienced self-represented litigant. The appellant's approach, had it been adopted at trial, would have been to bury the jury in an excessive level of detail which could well have served simply to drive the jury to the very conclusions they did reach in accepting and rejecting on the various counts. It has to be borne in mind that the jury acquitted on some counts, a fact which, on any reasonable view, indicates that they followed the learned trial judge's directions to consider each count separately and come to a conclusion on each count separately.

[94] Given the historical nature of the offences it is not, in my respectful view, surprising to find that the evidence of the various witnesses would contain inconsistencies and contradictions. However, having reviewed the evidence of the trial in light of the appellant's complaints about it, I am unable to reach the view that it was not open to the jury to be satisfied, beyond reasonable doubt, of the appellant's guilt on those

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94 The differences referred to were the accounts of the conduct out of which Counts 8, 9 and 10 were charged.

95 Affidavit #3 paragraph 73. This was a persistent theme in the appellant's attack on the evidence against him, namely that DAU's evidence was born out of jealousy at the amount of attention directed ADL.

96 Affidavit #3 paragraph 74.

97 Affidavit #3 paragraphs 77-79.

98 Affidavit #3 paragraph 82.

counts where a guilty verdict was returned. Notwithstanding the inconsistencies and contradictions, there was a level of support for the evidence of DAU and MAL, both between them and as derived from the preliminary complaint evidence, and the appellant's admissions to the police in his interview. That support meant it was open to the jury to be satisfied to the requisite standard. Notwithstanding its abhorrent nature, there was nothing inherently incredible in the account given by MAL and DAU. It is only if one subscribes to the appellant's theory of fabricated evidence, in DAU's case borne out of jealousy of ADL, that such doubt might be raised as to disturb the verdicts. There is no good reason to think that the jury should have subscribed to that view.

[95] Instead the case run at trial involved highlighting the inconsistencies and contradictions in the evidence. As well, the prejudicial effects of the delay between when the events occurred and the complaint to the police was made were highlighted, and would have been painfully obvious to the jury given the lapse of time. A deal of emphasis was given to the improbability of count 5, which concerned the allegation of rape in the car. Not only was the improbability highlighted, in terms of the appellant climbing over to the passenger seat and then achieving penetration, but also DAU's use of the word "trying" when describing the appellant's alleged act of penetration.

[96] However, careful directions were given to the jury as to the use of the preliminary complaint evidence, the significance of inconsistencies, the dangers and prejudice caused by delay[99] and the necessity for the jury to assess each count separately, according to the evidence on each count. No challenge to the directions was made on appeal.

[97] Furthermore, not only did the jury have the benefit of the addresses which focused on all the inconsistencies and contradictions, they had the benefit of a detailed summation of the evidence relevant to each count given to them by the learned trial judge.

[98] In the face of those matters it was, in my view, open to the jury to accept the evidence of DAU, notwithstanding that the events occurred when she was quite young, and notwithstanding the obvious inconsistencies and contradictions within her own evidence and between herself and MAL. On the appellant's admissions about his own conduct it would have been, in my respectful view, impossible to maintain a case that DAU had fabricated the account, and equally as impossible to maintain a case that her evidence was affected by her jealousy in respect of ADL, that being put forward by the appellant in his interview as being a motive for her to lie.

[99] Performing the task mandated by *SKA v The Queen* and *M v The Queen*, it is my view that it was open to the jury to be satisfied of the guilt of the appellant on the counts upon which they found him guilty beyond reasonable doubt. The jury had the unquestionable benefit of seeing the witnesses in person and being able to form a view as to the quality of their evidence. With the exception of being able to view the appellant's police interview, this court lacks that benefit and therefore it should give proper regard for the preeminent position of the jury as the arbiter of fact. The discrepancies and inadequacies highlighted by the appellant were ones of which the jury was well aware and plainly took into account in reaching their conclusions. I am unable to reach the conclusion that there is a significant possibility that an innocent person has been convicted.

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99 A Longman direction was given at AB 132.

[100] This ground fails.

Ground 3 – inconsistent verdicts

[101] The contention advanced on this ground was that the acquittals on counts 8 and 10 were inconsistent with the guilty verdict on count 9. Counts 8, 9 and 10 were alleged to have occurred at the one time, being an occasion when MAL and DAU were visiting him and he showed them a pornographic movie. Count 8 was unlawful and indecent dealing with MAL and counts 9 and 10 were unlawful and indecent dealing with DAU.

[102] The only evidence for these three counts came from DAU. There was no support from MAL. DAU's evidence was as follows:

> "Okay. Well, tell us about that?---I remember he had some movie – a pornographic movie, and he was playing it on – a screen or – I think it was a TV – like, a film projector screen.
>
> Yes?---In his bedroom. And he got my brother and I to undress and lay on the bed with him and watch the movie, and then he---
>
> What was happening in the movie? Do you recall?---There was a lot of, like, penetration and, like, close up stuff of people having sex and---
>
> Sure?---I remember bits and pieces of that night – about him having oral sex with me and my brother. He started, I think, with me and then got me to perform on him while he was performing oral sex with my brother.
>
> Okay?---I remember it made me feel quite sick in the stomach and I asked to go out and get a drink.
>
> Yes?---Because I just – I wanted to get away from it. So I went out and – to the kitchen and, sort of, stayed there as long as I could get away with staying there without getting in trouble. And then I went back into the bedroom.
>
> What happened then?---I'm not 100 per cent sure what happened. My brother and him were in a different position from when I left. When I left, my father was giving him oral sex, as well as my brother giving him oral sex. So when I left, they were in a different position, so I don't know if that continued or not, but---
>
> Sure?---I think it continued once we – once I came back in, but I don't remember very well after that.
>
> What happened with you, specifically, when you went back in the room?---I – I think I was performing oral sex with him. Yeah. … I don't remember 100 per cent of what happened after that because … I remember feeling quite ill about it – that I had to do stuff with my brother, as well, and he was touching me and … my father was telling … us to do stuff together.
>
> Alright?---So I – I felt a bit ill.
>
> Do you know if he ejaculated on that occasion?---Yes, I think so."[100]

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100 AB 41.

[103] In that account count 8 was the appellant sucking MAL's penis, count 9 was the appellant making DAU suck his penis, and count 10, the appellant making DAU suck his penis again.

[104] In cross-examination there was no specific attack on those counts. However, it was put to DAU that none of the things she had described had happened. It was put to DAU that at no time did the appellant behave in an indecent way towards MAL while she was present, and that at no time did he show her a pornographic movie.[101] Shortly thereafter it was put to her that the appellant "never did anything to [MAL] when you were present", and "there was never any occasion when you and [MAL] were together?". DAU disagreed with all of those propositions. It was also put to her that there was no occasion where the appellant behaved in any inappropriate way to her or MAL. DAU disagreed with all of those suggestions.

[105] MAL did not give any evidence supporting DAU's account in respect of these three offences.

[106] The jury also had the evidence given by the appellant in his police interview. That included an admission of sexual activity between himself and DAU,[102] at least one occasion when he had DAU perform oral sex on him in the car[103] and another occasion where she performed oral sex on him after a shower.[104]

[107] Recently the principles applicable to the issue of inconsistent verdicts was summarised in *R v McLucas*,[105] where Flanagan J said:[106]

> "[65] In *R v GAW* Margaret McMurdo P and Holmes JA (as the Chief Justice then was) by reference to *M v The Queen*, *Jones v The Queen* and *MacKenzie v The Queen* summarised the principles concerning inconsistent verdicts as follows:
>
> > "[19] The principles concerning inconsistent verdicts are well-established. Where alleged inconsistency arises in the jury verdicts upon different counts affecting an accused, the test is one of 'logic and reasonableness'; that is, whether the party alleging inconsistency has satisfied the court that the verdicts cannot stand together because 'no reasonable jury, who had applied their mind properly to the facts in the case could have arrived' at them.
> >
> > [20] However, respect for the jury's function results in a reluctance in appellate courts accepting a submission that verdicts are inconsistent in the relevant sense, so that:
> >
> > > '... if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted.

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101 AB 54 lines 29-34.
102 AB 281.
103 AB 282-283.
104 AB 283.
105 [2017] QCA 262.
106 *McLucas* at [65]-[67], Sofronoff P and Boddice J concurring; internal citations omitted.

> If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury.'

[21] In that regard, 'the view may be taken that the jury simply followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt'. Alternatively, the appellate court may conclude that the jury took a merciful view of the facts on one count; a function which has always been open to a jury.

[22] It is only where the inconsistency rises to the point that the appellate court considers intervention is necessary to prevent possible injustice that the relevant conviction will be set aside. While it is impossible to state hard and fast rules, the following provide examples of relevant inconsistency; where the different verdicts returned by the jury are an affront to logic and common sense which is unacceptable, and strongly suggests a compromise in the performance of the jury's duty, or which suggests confusion in the minds of the jury, or a misunderstanding of their function, or uncertainty about the legal difference between specific offences, or a lack of clarity in the instruction on the applicable law."

[66] In *R v Conn; R v Conn; Ex parte Attorney-General (Qld)* Sofronoff P (with whom Fraser JA and North J agreed) observed that it is not irrational for a jury to accept a witness's evidence in relation to some events while holding a reasonable doubt in respect of other events sought to be proved by the same witness, particularly when that witness is the only witness to prove all issues. Juries are invariably directed to consider each count separately by reference to the evidence applicable to that count. Sofronoff P further stated:

> "Frequently, the argument that a miscarriage of justice has occurred and can be demonstrated by what is said to be an irreconcilable inconsistency of verdicts is raised in cases in which the sole evidence implicating an accused is the uncorroborated evidence of a complainant. There will often have been a delay in the making of any complaint. Commonly it can then be said that there is no apparent difference in the character or quality of the evidence given by a complainant to prove each of the counts. However, it cannot be maintained that these factors alone would justify a conclusion that there has been a miscarriage of justice in any case in which a jury has convicted on some counts and acquitted on others. That is so because the significance of features like these will

> also depend upon the facts of a particular case, the way the trial has been conducted by the prosecution and the defence and the content of the Judge's directions to the jury."

[67] Importantly for present purposes Sofronoff P observed:

> "It must constantly be borne in mind, when considering such a ground of appeal, that it is not for the Crown to justify or to rationalise verdicts of conviction and acquittal. Differing verdicts are inherent in trials of multiple counts, particularly when a jury is warned against propensity reasoning. It is for an appellant to demonstrate a miscarriage of justice by showing, by reference to the facts, the evidence, the witnesses and the conduct of the trial, that the differing verdicts are actually irrational or repugnant to each other and not merely that they might be.""

[108] Further, some examples of the way in which verdicts might differ but not in a way such as to warrant setting them aside, was given in *R v Fanning*:[107]

> "[21] Various matters of principle have been settled about the assessment by an appellate court of the issue of inconsistent verdicts. They include:
>
> (a) the appellate court must be persuaded that the performance of the jury's duty has been compromised by verdicts which are an unacceptable affront to logic and common sense, or which suggest confusion in the minds of the jury, or legal differences between the offences, or a lack of clarity in the instruction on the applicable law;
>
> (b) as the test is one of logic and reasonableness, the question is whether the court is satisfied that no reasonable jury, who had applied their minds properly to the facts in the case, could have arrived at the various verdicts;
>
> (c) if there is a proper way by which an appellate court can reconcile the verdicts, appellate courts should accept the jury as having performed its function and be reluctant to accept a submission that verdicts are inconsistent;
>
> (d) different verdicts may be a consequence of a jury correctly following instructions to consider each count separately, and to apply the requirement that all elements must be proved beyond reasonable doubt;
>
> (e) different verdicts will show the required inconsistency where a verdict of acquittal necessarily demonstrates

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107 [2017] QCA 244 at [21]; referring to *R v CX* [2006] QCA 409 at [33]; *R v Smillie* (2002) 134 A Crim R 100; [2002] QCA 341 at [28]; and *R v SBL* [2009] QCA 130 at [28]-[34].

that the jury did not accept evidence which needed to be accepted to lead to the other verdict of guilty;

…

(g) a jury might find the quality of a crucial witness's evidence variable, even though it is accepted as generally truthful; some aspect of the evidence might point to faulty recollection on some points, or exaggeration on others, or an inherent unlikelihood about some aspect of the evidence, all of which casts doubt on the accuracy in those respects, but not of the witness's general honesty;

(h) in some cases it is possible that in respect of some counts there might be contradictory evidence which does not apply to other counts, and thus explains the variation in the verdicts; and

(h) it may be in some cases that the different verdicts are explicable on the basis that there was corroboration in respect of some counts, but not others."

[109] In my view, there are rational ways in which the jury could have concluded that it was satisfied beyond reasonable doubt of the appellant's guilt on count 9, though not on counts 8 and 10. First, there is the fact that MAL's evidence did not support any of the three counts. Secondly, DAU's evidence was quite brief on all three counts and accompanied by qualifications in terms of her memory. Specifically, DAU said that she did not remember the events after she returned to the room with any accuracy. That lack of memory could well have affected count 10, which depended upon being satisfied that there was a second time on that general occasion when the appellant caused her to give him oral sex. Logically the jury could have understood that to mean that the second time was when she came back into the room, and that is the period about which her memory was not good.

[110] Thirdly, the evidence of MAL was that the only occasion when there was any sexual contact between him and his father (the appellant) was the occasion the subject of counts 2 and 4.[108] That was the way it was summarised to the jury in the course of the summing-up.[109] That may have caused the jury to doubt DAU's evidence, at least to the point of not being satisfied beyond reasonable doubt of count 8.

[111] Fourthly, notwithstanding that the jury may have had doubts about counts 8 and 10, they may well have accepted DAU's evidence on count 9, which was the appellant's making her suck his penis. In the jury's consideration, the inherent likelihood of that having happened might have been bolstered by the admissions by the appellant during his police interview that there had been occasions of such oral sex. Further, the jury may have concluded that whilst they were not prepared to accept DAU's evidence that this was an occasion involving MAL, nonetheless they were prepared to accept that it was an occasion involving her performing the sexual act on her father.

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108 AB 144.

109 AB 144.

[112] The jury were directed, in a way to which exception cannot be taken, that they were to consider each count separately, review the evidence on each count separately, and not convict on any charge unless they were satisfied beyond reasonable doubt in respect of that particular charge. The verdicts are consistent with the jury performing that duty.

[113] I am unpersuaded that there is any affront to logic in respect of the differing verdicts on counts 8 to 10. This ground lacks merit.

Complaints about the trial process

[114] The appellant's submissions were in the form of an introductory statement followed by 14 "exhibits" to that introduction, dealing with a variety of complaints about the way the trial was run, his representation, and the state of the evidence. I will attempt to deal with those complaints, summarizing the point and then giving it consideration. In doing so it will be inevitable that some are combined essentially because of the way in which the submissions were made.

Legal representation changing

[115] One complaint by the appellant was that during the preparation for his trial, his legal aid representation was changed some six times. There is no independent evidence of this, but even if it were so, it would not, by itself, be a ground for appealing against the jury's verdict.

Legal representatives did not pursue discovery

[116] The appellant complains that he repeatedly instructed his legal representatives to ensure that the Crown provided full discovery. He contended that those instructions were ignored.

[117] There is no independent evidence to support those assertions. However, taking them at face value, it seems to be a contention that the appellant's legal representatives did not follow instructions. There is reason to conclude that any departure from the instructions given by the appellant to his legal representatives was soundly based. He filed an application to adduce further evidence before this Court. The further evidence he wished to produce is, presumably, the balance of the disclosed material in respect of which he blames his legal representatives. The further material is as follows:

(a) transcripts of opening and closing addresses;

(b) records of interview and statements by DAU; these were said to be statements dated 30 November 2013, 19 August 2014 and 4 March 2017;

(c) records of interview and statements by MAL; these were said to be made on 27 March 2014;

(d) record of interview and a statement by DAU's husband; this was a statement made on 4 March 2017;

(e) records of interview and statements by a preliminary complaint witness, LMR; said to be dated 17 November 2016;

(f) record of interview and statement by FWJ, dated 12 March 2017;

(g) "All that which is included in my exhibit, currently exhibit #12", to prove that the appellant provided "very detailed outlines and cross-references to the

statements of both principal complainants, with a clear and reputed instructions that the court was to be made aware of it all during the trial, to expose the enormous level of inconsistency, contradiction, obvious fabrication and overall unreliability of both witnesses' input"; and

(h) a copy of DAU's victim impact statement "before it was edited by the prosecutor"; the appellant explained that his Exhibit #14 "includes the copy of the 'original' of that document to provide evidence that she had included false information to the court, but that the prosecutor had edited that prior to submitting it as an exhibit".

[118] This Court had the benefit of all those documents. In so far as there were any points to be made out of them they are dealt with elsewhere in these reasons. The statements of DAU, DAU's husband, MAL, LMR and FWJ were all available at the trial, and used to cross-examine. There is nothing in the alleged failure to give disclosure of those documents. Transcripts of the opening and closing address may not have been available at the time of the trial, but that signifies nothing. In any event, complaints about their content have been made on this appeal, and are dealt with elsewhere in these reasons. That is also the case with the last two categories.

Bias on the part of the learned trial judge

[119] The appellant contended that "due to the level of unwarranted negative comment by" the learned trial judge during the trial, it was apparent that the learned trial judge "had formed a very biased attitude towards me prior to the trial". This was apparently a reference to a comment made by the learned trial judge in the course of the sentencing in proceedings number 199 of 2016. The appellant's reference to it as being a "trial" is not accurate as the appellant pleaded guilty and was sentenced accordingly. The apparent reference to the biased attitude and unwarranted negative comment was to the learned sentencing judge in those proceedings referring to the appellant in a way which was characterised by the appellant as being described as a "merciless monster".

[120] That was a sentence in respect of a multitude of sexual offences committed against the appellant's adopted daughter, ADL, from when she was seven years of age through to when she was over 15. The conduct involved acts of cunnilingus, rubbing his penis against her vulva and having her masturbate him. Just prior to when she turned 13, the appellant had sexual intercourse with her. After the family moved to Australia, there were three counts of incest which related to three occasions when the appellant had intercourse with her after she turned 15. Not surprisingly, in the face of that admitted behaviour, the learned sentencing judge used the following phrases to describe the seriousness of the offending:[110]

(a) it was "appalling behaviour to people who rightly trusted you and relied on you to protect them and care for them, not abuse them";

(b) "you have a predilection towards these type of offences";

(c) it was "all truly appalling behaviour";

(d) that the offences occurred over a variety of ages "just indicates the extent of your depraved attitude to those who should trust you"; and

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110 Appeal Book 199 of 2016 (**AB119**) pp 46-47.

(e) there was a lack of remorse and a complete lack of insight into the inappropriateness of the behaviour.

[121] Given that the offences which the appellant admitted, and for which he was being sentenced, encompassed three counts of committing an indecent act on ADL when she was under 16, one count of engaging in sexual intercourse with her and three counts of incest, the descriptions were all perfectly reasonable.

[122] In addition to the offences against ADL, there were two other charges. One was an assault against SWS, and the other a count of indecent treatment of MGA, who was then under 12.

[123] Some brief mention should be made of the facts concerning the charge relating to MGA. They involved SWS performing oral sex on MGA, and then lying on top of him and pushing MGA's penis into her vagina. The appellant's version to the police was that: he took MGA into the bedroom, where SWS was naked; he may have been the one to suggest that MGA remove his clothes; SWS then fondled and caressed MGA as she cuddled him; MGA's penis became erect and was in or towards SWS's vulva; he did not see actual penetration, but he could have given the instruction that "your penis goes in here".[111]

[124] The facts which were agreed in relation to ADL can be shortly stated. Whilst living in Thailand, the appellant and SWS adopted a Thai child who was then three years of age. From a very young age she was sexually abused by the appellant. When she was interviewed by the police, at the age of 15, she said in relation to the abuse that she did not feel sad about it and that it was "pretty normal". The appellant had sexual intercourse with her in Thailand from when she was almost 13, but that became less frequent when she started menstruating. After they arrived in Australia the appellant had sexual intercourse with her three times after she turned 15.

[125] When ADL was seven the two offences against her included licking her on the genitals while she lay naked on the bed, and he stood over her with his penis exposed, rubbing his penis against her vulva, and having her masturbate him until he ejaculated on her. The second offence consisted of licking her genitals, pushing his penis against her vulva and then being masturbated to ejaculation.

[126] When ADL was about eight or nine, the offence was having her masturbate him. Sexual intercourse occurred when she approached her 13th birthday and then there were the three occasions of sexual intercourse after she turned 15.

[127] Those circumstances amply justify the way in which the learned sentencing judge described the appellant's conduct. There is no merit whatever in this complaint.

[128] The appellant contended that ADL "was not the subject of violence, coercion or any level of threat from me at any time", and that she had kept in touch with the appellant with expressions of concern, encouragement and love. Those assertions have to be understood in the context that ADL was evidently groomed from a very young age to be an object of sexual pleasure by the appellant. There may have been no express violence or explicit threat, but there was plainly coercion. Any expressions of encouragement, concern or love emanating from her towards the appellant were the likely product of the grooming.

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111 AB199 p 53.

[129] Not surprisingly, the appellant's legal representatives took the view that such contentions would not assist the appellant. They were plainly correct.

Failure to put mitigating circumstances

[130] The appellant contended that his pleas of guilty in proceedings 199 of 2016 were "conditional on my counsel bringing to the attention of the Court the overall mitigating circumstances" as detailed in his Exhibit #7. That exhibit dealt with the charge of assault on SWS. I will turn to that now.

[131] The statement of events which the appellant termed as "mitigating circumstances" included the following:

(a) he was in the garden when he heard an argument between SWS and ADL;

(b) he went into the house to act as referee, and the argument subsided;

(c) five minutes later the argument began again, and again the appellant intervened; the argument subsided again;

(d) another five minutes later the argument erupted yet again and there was the sound of things being thrown around in the house;

(e) the appellant returned to the house to act as referee, but SWS and ADL were in "violent physical contact" and things were out of control; SWS began to scream hysterically and would not stop, and therefore the appellant slapped her on the face; "that only caused [her] to become more hysterical, with the volume of her screaming amplified"; therefore the appellant slapped her again, with no more success;

(f) in an attempt to have her stop the appellant and ADL then moved SWS, under protest, down the hallway into her bedroom where eventually she calmed down;

(g) the cause of the disturbance was the "habitual persecution" of ADL by SWS with "unwarranted nagging, picking and yelling over insignificant issues, and on occasion for no evident reason at all";

(h) after half an hour SWS left the house on foot and did not return; some hours later she was located at the house of his brother-in-law; a couple of days later the appellant and SWS spoke, and she requested a week or so to herself, which was agreed;

(i) however, she made a complaint to the police; and

(j) the appellant said his actions were an attempt "to quell an already volatile situation … with calm and level headed intervention … and in an effort to protect his [ADL] from the aggression of [SWS]".

[132] Given that this offence was the subject of sentencing at the same time as the admitted offences of sexual offending against MGA and ADL, and that any sentence for those offences would inevitably be of far greater duration than anything imposed for the assault against SWS, it is entirely understandable that his legal representatives did not advance what the appellant mistakenly thought were mitigating circumstances. Notwithstanding that, the appellant's Counsel, who was a very experienced criminal lawyer, had this exchange with the learned sentencing judge:

> "On the facts, there's very little comment that I wish to make, although [the appellant] has asked me to explain that when it came to the assault upon his wife, he was … intervening … in a fight between her and his daughter that had been going on for some time.
>
> HIS HONOUR: Yes. You won't need to convince me that it isn't appropriate…"[112]

[133] The essence of the so-called mitigating circumstances were put before the sentencing judge. In the context of the charges to which he had pleaded guilty, that was by far a minor matter and in a different category to the other offending, as the learned judge acknowledged.[113]

[134] There is nothing of substance in this complaint, and it should be rejected.

Undisclosed Crown witnesses

[135] This complaint related to what the appellant said was the unannounced calling of four extra witnesses whose statements were only provided on the morning of the trial. The appellant contends that notwithstanding his instructions to object, his legal representatives did not object and therefore the trial was unfair and a miscarriage followed.

[136] The difficulty with the appellant's complaint in this respect is that he had competent legal representatives at the trial who did not object. Presumably there were reasons why they did not. The appellant's own outline identifies one reason, which was that the legal representatives did not consider that those witnesses had much to say that was relevant.[114]

[137] Two of the witnesses were the appellant's first wife, FWJ, and LMR. LMR gave preliminary complaint evidence[115] and FWJ (the mother of the two complainants) also gave evidence of preliminary complaint by DAU.[116] Given that was the nature of their evidence, and that the preliminary complaint in each case came from DAU, it is not difficult to see that there was no logical ground upon which objection could be taken. The evidence was clearly relevant and admissible as preliminary complaint evidence. As long as there was adequate time to cross-examine DAU as to the matters in the new statements, there was no basis to object.

[138] An additional witness, DAU's husband, also gave evidence of preliminary complaint by DAU.[117] His evidence falls into the same category as those mentioned above, and the same analysis applies.

[139] Apart from the two complainants, the only other witness was the appellant's second wife, SWS. Her evidence was of an admission by the appellant, that he had told SWS that DAU "came into my bed and tried to use her mouth on my teddy", that being a reference for his penis. Further, the appellant told her that he "kissed

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112 AB199 p 36 lines 4-6.
113 AB199 p 36 line 10.
114 Affidavit #3 paragraph 10 identifies the lawyer's advice as "it is of no importance because these are mostly Primary Witnesses whose testimony will not 'hold much weight' anyway".
115 AB 82-83.
116 AB 75-77.
117 AB 69-70.

[DAU] on her Suzie", that being a nickname for her vagina.[118] That evidence was led in a leading way which, Counsel for the appellant at trial explained, was by consent.[119] There was no cross-examination of SWS.

[140] It seems evident from that recitation that Defence Counsel was aware of SWS's evidence, and had taken instructions upon it, as there was no challenge to it.

[141] I am unable to discern that there was any relevant unfairness in respect of those witnesses, much less any miscarriage of justice. This complaint should be rejected.

Separate complaints about the evidence of SWS

[142] The appellant also contends that the evidence of SWS should not have been admitted because:

(a) she was not a compellable witness as she was his spouse;

(b) the police threatened to charge her, or her visa would be cancelled, if she did not give evidence;

(c) she was a claimant in a separate matter and therefore had "an axe to grind";

(d) in order to prejudice the jury evidence was led that she was in the process of divorcing the appellant;

(e) her evidence was given in answer to leading questions; and

(f) her evidence was hearsay.[120]

[143] The appellant mistakes the first point. He referred to s 8(4) of the *Evidence Act* 1977 (Qld) but that section was repealed in 2003.[121] Since that time a spouse has been both competent and compellable to give evidence against their partner.

[144] There is no evidence to support the suggestion that SWS was threatened by police.

[145] It is true that she was asked and affirmed that she was in the process of divorcing the appellant, but it is hard to see how that could have prejudiced the jury given the subject matter otherwise. It is also true that she was asked leading questions but that was by consent of the Defence Counsel.[122]

[146] Her evidence was of admissions by the appellant concerning conduct involving DAU; it was not hearsay. It may be that SWS could have been cross-examined as to whether she had an axe to grind but that decision was one for the Defence Counsel, no doubt influenced by tactical considerations. It is difficult to see what difference it would have made given the appellant's admission in the police interview of offending conduct against DAU.

Prosecutor's statements in opening address

[147] A matter of which the appellant complained was that throughout the Prosecutor's opening of the case to the jury he referred to various matters as "evidence" when they were not. As oral argument was developed, it became apparent that the

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118 AB 64.
119 AB 64 lines 20-23.
120 Affidavit #3 paragraphs 10-11.
121 *Evidence (Protection of Children) Amendment Act* 2003 (Qld), s 56.
122 AB 64 lines 20-25.

appellant's complaints centred on statements that a particular witness was expected to say something when they were in the witness box. The complaint proceeded from a fundamental misunderstanding of the nature of an opening statement. All the Prosecutor was doing was informing the jury, as he was entitled to, as to the evidence he expected would be given by various witnesses. There was nothing objectionable in what took place.

Prosecutor's closing address

[148] The appellant had an additional complaint about statements by the Prosecutor during his closing address. It concerned the following passage:[123]

> "The accounts of [DAU] and [MAL] involve opportunistic conduct when there was nobody else around. Fast forward decades to now. We have a different society. Sexual abuse isn't swept under the carpet as much. We've seen Royal Commissions uncover sexual abuse. Celebrities such as Rolf Harris and Hey Dad star Robert Hughes have been convicted of offences spanning back many decades for sexual abuse of young people. This is now more of a mainstream issue."

[149] The appellant complained that the Prosecutor's inference, which was one the jury would have adopted, was that because Royal Commissions had uncovered sexual abuse and high profile celebrities had been charged with offences, and because those offenders were found guilty, then the appellant must also be guilty.

[150] The passage referred to does not give rise to that risk. All the Prosecutor was saying was that there was a reason why DAU and MAL might have come forward after so many years. The context was a reference to a possible defence issue in closing address, namely that there could have been other witnesses who would have come along and assisted the trial had it been heard in the 1980s.[124] In my view, all that was being conveyed by the Prosecutor was that the passage of time had resulted in sexual abuse becoming more of a mainstream issue, which might explain why the complainants had come forward after so long and why the delay was not such as would prevent the jury from reaching a conclusion on guilt. As the Prosecutor pointed out immediately before the passage referred to above, the prejudice caused by the delay might be that relevant witnesses could not be investigated, but the appellant's acts were opportunistic in nature, conducted when no-one else was around and therefore, such witnesses were unlikely to exist. That fact, combined with the change in attitudes towards disclosure of sexual abuse, might satisfy the jury that there was no relevant prejudice caused by the delay.

Other conduct by the Prosecutor

[151] Various other complaints were voiced during the course of the appeal, either in the appellant's written outline or in oral argument, concerning things done by the Prosecutor. They do not need elaboration because none of them could amount to any prejudice. One example will demonstrate why. The appellant complained that the Prosecutor made an unfounded assertion in regard to "memories", where the Prosecutor adopted "an amateurish 'pseudo-psychologist opinion', and prejudicially refers to the Appellant as a 'liar', and inferring 'no credibility'".[125] The complaint

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123 Transcript of closing address p 13 lines 12-18.

124 Transcript of closing address p 13 line 7-8.

125 Exhibit #5(a) paragraph 09, referring to AB 108 lines 40-45.

is pointless because the Prosecutor's comments, whatever they were, were in an exchange with the learned trial judge and in the absence of the jury.

[152] In a similar vein were complaints about exchanges between the Prosecutor, Defence Counsel and the learned trial judge in the course of discussing what directions should be given.

Conduct by Defence Counsel

[153] The appellant complained that his trial Counsel disobeyed instructions and his own promises to bring up as much of the extensive level of obvious inconsistency, contradiction, or misleading evidence as possible. The appellant asserts[126] that just before his closing address trial Counsel told the appellant that he would not be bringing up all the inconsistencies, contradictions and misleading evidence, because "… the Jury already hates you, and if I, as your representative, start showing the Complainants and the other Primary Witness to have been less than truthful or reliable, the jury will hate me too …". These were said to be the exact words of his Defence Counsel. As a consequence, it was submitted, the Defence Counsel's address was very brief and grossly inadequate.

[154] Leaving aside the asserted comment, the criticism of Defence Counsel's address is misplaced. What the jury were told was that most of Counsel's task that day was to remind them of the evidence as part of a submission that "there are problems everywhere you look in the prosecution case".[127] Defence Counsel emphasised the concerns the jury would have about the reliability and credibility of the complainants and the inconsistencies in their evidence. Further, that some of the offences were not committed in a private way as there were six charges where another person was present. The differences were said to be such that on those counts where both MAL and DAU were involved, their evidence was "irreconcilably different".[128] Defence Counsel spent some time identifying and emphasising the inconsistencies between the witnesses and the inherent incredibility of some of the evidence. Having done that, Counsel submitted that the prosecution case was such that the evidence simply doesn't stack up and described it as "a shambles".[129]

[155] The way in which Defence Counsel addressed suggests strongly that the comment allegedly made to the appellant just prior to address was not, in fact, made at all. What is more likely, in my view, is that the appellant pressed his Counsel to raise a lot of matters that had no substance, and his Counsel sensibly declined to do so. Decisions such as that are precisely the territory of trial Counsel and are not to be second guessed simply because the outcome is not what one expected it to be.

[156] The High Court has said that the relevant question is whether there has been a substantial miscarriage of justice, or, to put it differently, whether the accused lost a chance of acquittal that was fairly open.[130] Thus in *TKWJ v The Queen*[131] it was said:

> "[25] Where decisions taken by counsel contribute to a defect or irregularity in the trial, the tendency is not to inquire into counsel's conduct, as such, but, rather, to inquire whether there

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126 Affidavit #3 paragraph 18.
127 Transcript of closing address p 16 line 9.
128 Transcript of closing address p 15 line 40.
129 Transcript of closing address p 21 line 23.
130 *TKWJ v The Queen* (2002) 212 CLR 124 at [32], [66] and [79]; [2002] HCA 46; *Nudd v The Queen* (2006) 80 ALJR 614; [2006] HCA 9 at [11]-[12], [24]-[25] and [158].
131 *TKWJ v The Queen* (2002) 212 CLR 124; [2002] HCA 46.

has been a miscarriage of justice, or, if the proviso to the criminal appeal provisions is engaged, whether "no substantial miscarriage of justice has actually occurred". In that exercise, the question whether the course taken by counsel is explicable on a basis that has or could have resulted in a forensic advantage is a relevant, but not necessarily a decisive, consideration.

[26] The question whether there has been a miscarriage of justice is usually answered by asking whether the act or omission in question 'deprived the accused of a chance of acquittal that was fairly open'. The word 'fairly' should not be overlooked. A decision to take or refrain from taking a particular course which is explicable on basis that it has or could have led to a forensic advantage may well have the consequence that a chance of acquittal that might otherwise have been open was not, in the circumstances, fairly open."[132]

…

"[79] The critical issue in an appeal like the present is not whether counsel erred in some way but whether a miscarriage of justice has occurred. However, 'whether counsel has been negligent or otherwise remiss ... remains relevant as an intermediate or subsidiary issue'. That is because the issue of miscarriage of justice in such cases ordinarily subsumes two issues. First, did counsel's conduct result in a material irregularity in the trial? Secondly, is there a significant possibility that the irregularity affected the outcome? Whether a material irregularity occurred must be considered in light of the wide discretion that counsel has to conduct the trial as he or she thinks best and the fact that ordinarily the client is bound by the decisions of counsel. Accordingly, 'it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence'. The appellant must show that the failing or error of counsel was a material irregularity and that there is a significant possibility that it affected the outcome of the trial."[133]

[157] Some years after *TKWJ* the High Court restated that miscarriage of justice is the true question, in *Nudd*:[134]

"[24] As four members of this Court explained in *TKWJ v The Queen*, describing trial counsel's conduct of a trial as 'incompetent' (with or without some emphatic term like 'flagrantly') must not be permitted to distract attention from the question presented by the relevant criminal appeal statute, here s 668E of the *Criminal Code* (Qld). 'Miscarriage of justice', as a ground on which a court of appeal is required by the common form of criminal appeal statute to allow an appeal against conviction, may encompass any of a very wide variety

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132 *TKWJ* at [25]-[26] per Gaudron J, Gummow and Hayne JJ concurring. Internal footnotes omitted.

133 *TKWJ* at [79] per McHugh J. Internal footnotes omitted.

134 *Nudd* at [24]-[25] per Gummow and Hayne JJ. Internal footnotes omitted.

> of departures from the proper conduct of a trial. Alleging that trial counsel was incompetent does not reveal what is said to be the miscarriage of justice. That requires consideration of what did or did not occur at the trial, of whether there was a material irregularity in the trial, and whether there was a significant possibility that the acts or omissions of which complaint is made affected the outcome of the trial.
>
> [25] Pointing to the fact that trial counsel did not take proper instructions from the accused, did not properly understand the statutory provisions under which the accused was charged, or had not read the cases that construed those statutory provisions, would reveal that counsel was incompetent. Showing all three of these errors would reveal very serious incompetence. But an appeal against conviction must ultimately focus upon the trial and conviction of the accused person not the professional standards of the accused's counsel. Was what happened, or did not happen, at trial a miscarriage of justice?"

[158] More recently this Court, referring to *TKWJ* and *Nudd*, adverted to the role of Counsel and the principles applicable to assertions such as a failure to carry out instructions or cross-examine adequately, in *R v Bush (No 1)*:[135]

> "[60] The principles that apply to a ground of appeal based upon a miscarriage of justice arising as a result of the conduct of the trial by counsel have been established authoritatively in a series of cases. The notice of appeal in this case is flawed because it fails to identify what the miscarriage of justice might have been. The failure of counsel to advise in a particular way and the failure of counsel to cross examine witnesses 'adequately', if established, would be immaterial unless they occasioned a 'material irregularity in the trial'. Whether a proven irregularity gives rise to a miscarriage may depend upon whether or not the act of counsel that is complained of was undertaken for calculated tactical reasons. A course undertaken deliberately makes it very difficult for an appellant to succeed upon such a ground because, as has been repeated many times, the system of criminal justice is an adversarial system and is based upon the general assumption that parties are bound by the conduct of their legal representatives. Counsel has, and necessarily must have, a wide discretion in conducting a case. Questions that arise for consideration during the conduct of a trial may be ones that allow lengthy forethought or they may require fast decisions to be taken. Either way, they are usually not amenable to any fruitful debate to which a client can contribute. The discretion has been described as one amounting to an "unlimited authority". These principles as to the role of counsel, including counsel's authority to bind the client, are "fundamental to the operation of the adversary system, and form part of the practical content of our notions of justice."

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135 [2018] QCA 45 at [60]. Internal footnotes omitted.

[159] Nothing that the appellant has identified compels the conclusion that his Counsel's conduct (in the sentencing before Boddice J or the trial) led to a miscarriage of justice.

Prosecutor's closing address – prejudicial statements

[160] The appellant spent some considerable time on an analysis of the Prosecutor's closing address which, he contended, showed "relentless efforts to render the Jury irreconcilably 'biased and prejudiced' against the Appellant".[136] What then followed was the appellant's recitation of a number of instances where, he contended, the Prosecutor overstepped the mark and attempted to prejudicially influence the jury. Leaving aside the comments concerned with the application to discharge the jury[137] they included:

(a) what was said to be the Prosecutor's adopting "an amateurish 'pseudo-psychologist' opinion", by inferring that the appellant was a liar and had no credibility;[138]

(b) the Prosecutor suggesting to the jury that when witnesses referred to counts 2, 3 and 4 on the one hand, and counts 8, 9 and 10 on the other, they were talking about the one incident; the appellant's contention was that they were two alleged events separated by a number of years and MAL rejected that one of them had occurred at all;[139]

(c) occasions where the Prosecutor characterised the evidence of one or other witness, urging or suggesting that the jury might accept it in a particular way;

(d) alleged misstatements by the Prosecutor, for example where he submitted that the offences had been committed when no-one else was around, when that was, according to the appellant, contradicted by some of the other evidence;

(e) the Prosecutor's reliance upon certain evidence when, according to the appellant, it was objectively improbable or impossible;[140]

(f) an occasion where the Prosecutor was said to have tried to "rationalise his own 'false insinuation' by contradicting it, and even after being warned by the Judge, suggested the Jury should adopt the 'guilty *one* guilty *all*' attitude";[141] and

(g) where the Prosecutor allegedly went to "great lengths to infer that the Jury should 'not be overly concerned' about the 'Beyond Reasonable Doubt' provision".[142]

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136 Exhibit #5(a) paragraph 05.

137 Being the reference to the appellant as a paedophile, and the reference to the impact of Royal Commissions and high profile celebrities who have been charged, both of which are dealt with above at paragraphs [148]-[150] above.

138 Exhibit #5(a) paragraph 09.

139 Exhibit #5(a) paragraph 10.

140 For example, Exhibit #5(a) paragraphs 17-19.

141 Exhibit #5(a) paragraph 22. This referred to what was said at p 8 of the closing addresses, lines 38-45. The Prosecutor said no such thing. All he did was urge that they convict on certain counts that were based on the testimony of MAL.

142 Exhibit #5(a) paragraph 22. This is a reference to p 13 of the closing address at lines 30-45. The Prosecutor said no such thing, but was merely emphasising that satisfaction beyond reasonable doubt did not mean that they had to be satisfied beyond reasonable doubt of every piece of evidence in respect of a charge. The Prosecutor reminded the jury that they were to apply the law as directed by the judge.

[161] There is nothing of substance in the appellant's contentions in this regard. Having read the closing address it is apparent that the Prosecutor was simply characterising the evidence and addressing the jury as to how he contended they might accept that evidence. The only time that objection was raised by Defence Counsel or by the learned trial judge was in respect of the reference to the appellant as a paedophile. For the reasons addressed earlier[143] that conduct by the Prosecutor was not such as to cause a miscarriage of justice. Otherwise, it is simply the case that the Prosecutor was advancing a particular characterisation of the evidence, and making submissions as to how the jury might rationalise that evidence and reach a conclusion of guilt on the various charges. One must bear in mind that the summing-up by the learned trial judge followed the addresses and, had there been any overstepping of the mark, that would have been the subject of appropriate direction.

Contradictory and inconsistent witness statements

[162] The appellant contended, by reference to the statements by witnesses given to the investigating police officers, that there were inconsistencies and contradictions within them rendering the evidence of those witnesses as improbable or impossibly unsafe.[144] The appellant's approach evidences a fundamental misunderstanding of the nature of criminal trial proceedings. He seems to have been of the view that those statements were presented to the jury. Of course they were not, as the evidence was given *viva voce*. The statements were available to Defence Counsel and, no doubt, used by him in terms of cross-examination. Merely pointing to inconsistencies or contradictions within them does not advance any contention that in some way the trial process miscarried.

[163] The same approach was taken in respect of the statements given by MAL,[145] DAU's husband,[146] LMR and FWJ.[147]

Extracts of the instructions by the appellant

[164] The appellant included in his written outline, as Exhibit #12, extracts of the instructions he provided to his legal representatives for use at the trial. His contention was that those instructions "were almost totally ignored throughout". The two documents forming part of Exhibit #12 are, as the appellant says in them, "pertinent extracts" of letters he sent to his legal representatives outlining an analysis of the statements of the witnesses against him. Insofar as they carry out an analysis of the statements, they simply highlight inconsistencies, contradictions or improbabilities in the account contained in the statements. The appellant's complaint is that what he had written was ignored. That really cannot be accepted given the way in which the witnesses were cross-examined, the inconsistencies and contradictions identified to the jury, and the fact that Defence Counsel no doubt made decisions as to what would be persuasive to a jury in terms of causing them to doubt the credibility and reliability of the Crown witnesses. An endless minute analysis of every tiny inconsistency or contradiction would hardly do that.

[165] The second feature of the two exhibits is what it reveals as to the appellant's belief about why MAL and DAU were making the complaints. He proffered three central

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143 See paras [19]-[43] above.
144 See Exhibit #7(1), (2) and (3), referring to three statements by DAU.
145 Exhibit #8, referring to MAL's statement dated 7 March 2014.
146 Exhibit #9.
147 Exhibit #9, Exhibit #10 and Exhibit #11.

themes. The first was DAU's "quest towards monetary compensation at the end of the game".[148] The second was her attempt to "provoke the maximum detrimental consequence" to the appellant and his family.[149] The third was DAU's "resentment and antipathy" towards ADL, triggered by the appellant revealing "the unbridled love, pride and devotion I have for [ADL] and her capabilities".[150] A similar suggestion was made in respect of MAL's motivation, namely that he had an axe to grind and was doing his best to extract retribution because of the love and attention devoted to ADL, but not to him.[151]

[166] The difficulty confronting the appellant's legal representatives by the exercise in those two documents was not only the need to find an effective method of challenging the Crown witnesses, both as to credibility and reliability, but also the danger posed by the appellant's admissions. Those admissions were reflected in his instructions to his legal representatives that DAU was "indeed with some level of foundation, a legitimate claimant up to a point".[152]

[167] The appellant's instructions to his legal representatives were that DAU had "to a significant degree, … 'deliberately fabricated (invented)' and manipulated much of what appears in [her statements]".[153] That said, the appellant reiterated that he was "not suggesting there is no case at all to answer, and I will – if a realistic balance is achieved, as I have repeatedly assured – not contest what I consider to be genuine grievance or blameworthy behaviour".[154]

Indemnity to SWS – police coercion?

[168] The appellant contended that the fact that SWS gave a statement pursuant to an undertaking under s 13A of the *Penalties and Sentences Act* 1992 (Qld) suggested police coercion in relation to her testimony.[155] It is true that the statement by SWS recorded that it was pursuant to such an undertaking, and that her agreement to give evidence was on the understanding that she would receive a lesser sentence, for the offence with which she had been charged, than she would without the benefit of the undertaking. That does not constitute an inducement, threat or coercion in respect of her testimony.

DAU's victim impact statement

[169] The appellant contended that certain deletions made to the victim impact statement demonstrated DAU's fabrication and general dishonesty.[156] There were deletions from the original victim impact statement, namely to remove a reference to MAL's being beaten, and to SWS being beaten when the appellant didn't like what she did. Without more the mere fact of the deletion of those references does not lead to the conclusion that what else was said was the product of fabrication or general dishonesty, nor could that conclusion be drawn in relation to her evidence as to the

148 Exhibit #12(a) paragraph 02.
149 Exhibit #12(a) paragraph 02.
150 Exhibit #12(a) paragraphs 03, 06; Exhibit #12(b), paragraph 02.
151 Exhibit #12(b) paragraph 21.
152 Exhibit #12(a) paragraph 10.
153 Exhibit #12(a) paragraph 11.
154 Exhibit #12(1) paragraph 12.
155 Exhibit #13.
156 Exhibit #14.

actual events. It is as consistent with that victim correcting her statement, or being unprepared to go that far. This argument does not assist the appellant.

Letter from ADL

[170] The appellant included in his submissions a copy of a handwritten letter from ADL, contending that it was "indisputable evidence that he has the love, devotion and unconditional support" of her.[157] The letter undoubtedly expresses love and devotion to the appellant, but that may be expected from someone who has been groomed from a very young age. The letter has, in my view, no persuasive weight in the face of the evidence otherwise on the convictions, and little weight on the sentence.

Instructions to lawyers – part 2

[171] The appellant provided a further extract of the instructions to his defence lawyers.[158] This repeated his view that DAU's evidence was tainted by her animosity towards her newly discovered adopted sister.[159] Otherwise it pursued the conclusion that DAU's evidence was the product of fabrication and manipulation, by an analysis of the inconsistencies and contradictions in the statements of DAU and MAL. They add nothing more to what has gone before.

[172] None of the above complaints add anything to the general attack on the verdicts. For the reasons given they are not persuasive.

Application for leave to appeal against sentence

[173] There are two applications for leave to appeal against sentence. The first is in CA 119 of 2016. It relates to the sentences imposed on 1 July 2016 when the appellant was convicted of various offences in relation to ADL, MGA and SWS. The second is in CA 59 of 2017 and relates to the sentences imposed for the offences of which he was found guilty in respect of DAU and MAL, which were the subject of the trial and the appeal against conviction dealt with above. There are separate issues to be dealt with, but some of the submissions made by the appellant relate to both applications. Where necessary, I will attempt to deal with those that are interwoven on the two applications.

[174] As mentioned earlier, the two sentences are linked in that the second in time was fashioned on an agreed basis so that it took into account all offending and the appellant's time in custody from the very start.

Sentence – CA 119 of 2016

[175] Three separate indictments were presented on separate occasions[160] comprising a total of nine offences committed against the appellant's adopted daughter ADL, grandson MGA and wife SWS. He entered pleas of guilty to all those charges.[161]

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157 Exhibit #6.
158 Exhibit #8.
159 Exhibit #8 p 1.
160 Indictment 757/15.
161 A plea of guilty to the seven counts on indictment 757/15 was entered on 23 March 2016. The guilty plea to the single count on indictment 562/16 was entered on 1 June 2016 (on what was to have been the first day of a trial). The plea of guilty to the single charge on indictment 560/16 was entered on 1 July 2016.

[176] The offences and the sentences imposed on each are set out below in the following table:

Indictment/Count	Offence	Sentence of imprisonment
Indictment 757/15	**Offences against adopted daughter, ADL**	
Count 2	Committing an act of indecency on a person under the age of 16, whilst outside Australia (Commonwealth offence)	6 years
Count 6	Committing an act of indecency on a person under the age of 16, whilst outside Australia (Commonwealth offence)	6 years
Count 8	Committing an act of indecency on a person under the age of 16, whilst outside Australia (Commonwealth offence)	6 years
Count 9	Engaging in sexual intercourse with a child outside Australia while the child was under the care/supervision of authority of the appellant (Commonwealth offence)	6 years
Count 10	Incest on a date unknown between 29 April 2013 and 1 October 2013	8 years
Count 11	Incest on a date unknown between 29 April 2013 and 1 October 2013	8 years
Count 12	Incest on a date unknown between 29 April 2013 and 1 October 2013	8 years
Indictment 562/16	**Offence against grandson, MGA**	
Count 1	Indecent treatment of a child under 16 years and under 12 years, whilst under care and a lineal descendant of the appellant	2 years
Indictment 560/16	**Offence against wife, SWS**	
Count 1	Assault occasioning bodily harm (a domestic violence offence) in November 2013	12 months

[177] All of the offences in respect of indictment 757/15 were committed against ADL. She was born in about 1998 and was therefore seven years old when counts 2 and 6 occurred, eight to nine years old on count 8, 12 years old on count 9 and 15 years old for counts 10-12.

[178] The offence in indictment 562/16 was committed against MGA when he was five years old. As will become apparent, that offence also included the participation of SWS.

[179] The offence in indictment 560/16 consisted of striking SWS on the face and grabbing her arm, all in the course of a verbal domestic dispute.

Circumstances of the offending

[180] Three agreed schedules of facts were tendered to the learned sentencing judge. They formed the basis upon which the appellant was sentenced for those offences.

Offences against ADL

[181] The appellant married SWS in Thailand in the mid-1980s. In about 2001 they effectively adopted a female child then aged about three years. She was formally adopted in Thailand some years later. They lived as a family in Thailand until 2012 when they moved to Australia. ADL was 14 when they moved to Australia.

[182] From a very young age in Thailand, ADL was sexually abused by the appellant. When interviewed by police in November 2013, at the age of 15, ADL said she felt sad about the abuse but that it felt "pretty normal". She could not recall how old she was when the offending started, and said she grew up with it and "… and so I, I guess that, I, I just kind of know that okay, I have to get, get it done and then that's it".[162]

[183] ADL did not particularise any offences in Thailand, saying that it happened once in a while when the appellant would call her into his bedroom and he would commence the abuse. She said the appellant had sex with her in Thailand when she was almost 13 but that it became less frequent when she started menstruating. Upon their arrival in Australia the appellant had sexual intercourse with her three times after her 15th birthday, over a period of about six months. Those three occasions formed the basis of the incest counts.

[184] The offences which formed the basis of counts 2, 6 and 8 were all witnessed by SWS. It was her evidence which formed the basis of those charges. Count 9 was the first occasion when the appellant had sexual intercourse with ADL in Thailand.

[185] The offences came to light when SWS made a complaint to police about being assaulted by the appellant. Police interviewed ADL where she disclosed the abuse in general terms. She had not told anyone else of that abuse.

[186] In respect of count 2, SWS saw the adopted daughter in the bedroom lying naked on the bed. The appellant was standing over her with his penis exposed. The appellant licked her on the genitals and rubbed his penis against her vulva. The appellant had ADL masturbate him until he ejaculated on her.[163]

[187] Count 6 was an occasion when, a week or two after the previous event, SWS saw the appellant licking ADL's genitals while she was on the bed. Once again, he pushed his penis against her vulva. SWS held ADL's hand until the appellant ejaculated on her.[164]

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162 AB199 p 50.
163 AB199 p 51.
164 AB199 p 51.

[188] Count 8 occurred when ADL was eight to nine years old. The appellant had taught her that when he told her to "take a walk" that meant he wanted her to masturbate him. SWS recalled that she opened the door to the bedroom and saw ADL pulling the appellant's penis.[165]

[189] Count 9 occurred as ADL was approaching the age of 13. They were still living in Thailand. The appellant had sexual intercourse with her.[166] On each of counts 10-12, ADL was aged about 15. These counts occurred in Australia. On each occasion the appellant called her into his bedroom and had sexual intercourse with her. He lay on top of her and put his penis in her vagina. On each occasion it took about ten minutes. ADL said there was "no kissing or anything else … and its done, and I go".[167]

Offence against MGA

[190] The appellant was the maternal grandfather of this complainant. When MGA was five years old he was visiting the appellant and SWS. The offence occurred in the main bedroom of the house. Either SWS had bathed him and taken him into the bedroom naked, or the appellant had taken him into the bedroom. SWS was naked and, with the appellant's agreement, MGA's clothes were removed. SWS performed oral sex on MGA. The appellant had no recollection of that activity, but accepted that he would not have objected to it. SWS lay on top of MGA. She pushed MGA's penis into her vagina. Either SWS or the appellant said "It's okay. Your penis goes in here".

[191] When the appellant was interviewed in December 2013 he said that it was his fault that this event occurred. He said he took MGA into the bedroom where SWS was naked, and it may have been him who suggested that MGA remove his clothes. SWS then "fondled and caressed" MGA as she cuddled him. MGA had an erection and his penis was in or towards SWS's vulva. The appellant said he did not see any actual penetration and he did not otherwise participate in the event. However, he said he could have given the instruction "your penis goes in here", but did not remember one way or the other.

Offence of domestic assault on SWS

[192] By the time of this offence the appellant had been married to SWS for 27 years. She described him as controlling and abusive, both verbally and physically. The appellant's brother-in-law, BGW, described the appellant as very dominating of SWS, putting her down and calling her "shit for brains".

[193] On 26 November 2013, in the context of a verbal domestic argument, the appellant struck SWS across the face, cutting her lip on the inside. He grabbed her upper left arm and squeezed it tightly, hurting SWS and bruising that area of her arm. He yelled at her "This is your fault; you're the one that cause (sic) the problem".[168]

[194] ADL saw the appellant hit SWS across the face and told police that SWS was "screaming badly so he, he hit her … well um he, he, he just … he just hit her across … the face".

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165 AB199 p 52.
166 AB199 p 52.
167 AB199 p 53.
168 AB199 p 54.

[195] SWS left the house and walked to BGW's house where she was seen to be crying, and she had marks and swelling on her lips and on the left side of her face. Arrangements were made for the appellant to go over to that house two days later. He demanded that SWS go home, and told his version of the incident which was that it was all SWS's fault and that she always picked on ADL. He admitted that he had hit SWS, saying she deserved it because she would not shut up. When BGW told him that it was against the law to hit women in Australia, the appellant replied: "It might be your law, it's not my law. She deserved it. If she deserves it, she will get it from me".

[196] The matter was reported to police and SWS was seen at the hospital. She had cuts to both lips, a bruise on her inner left upper arm and bruises to her right neck. On 1 December 2013 the appellant declined to participate in an interview about that matter.

Appellant's antecedents

[197] The appellant was born in 1947 and was therefore 43 to 44 years old when he committed the offence against MGA, 57 to 65 years old at the time of the offences against ADL, and 65 at the time of the offence involving SWS. At the time of being sentenced for those offences he had no previous criminal convictions.

[198] In the course of sentencing submissions the learned sentencing judge was told, without objection, something of the appellant's background. A deal of that came from the police interview to which I have referred in the course of dealing with his appeal against his convictions. The relevant parts are in paragraphs [22] to [31] above. Senior Counsel for the appellant referred to that interview drawing attention to the fact that the appellant had impulses which he could not control but had expressed a desire to be rehabilitated.[169] The appellant came from a family of five children and his father was a violent drunk who left the family when he was about 13. His elder brother then left so that the appellant was, in effect, the man in charge of the household. He had a good work history, primarily in small business. He ran a successful business with a building company in Papua New Guinea before 1972. He married FWJ when he was young, staying with her for about 15 years. In his mid-30's he met SWS, to whom he was still married at the time of sentencing.

[199] The appellant recalled his own sexual abuse as a child, which started when he was very young. That was indicated in his view that there might be some sort of genetic imprint that was driving him to offend in the way he had. Those who sexually abused him included two paternal uncles and a step-brother and possibly others.

[200] Senior Counsel submitted that the appellant had heard the victim impact statement from ADL and recognised he would have to beg for her forgiveness but that would not arise until he had undergone some intensive counselling and therapy. Acknowledging the damage that he had done by sexually abusing ADL, the appellant was said to be otherwise a devoted father to her, very nurturing of her academic and musical strengths, and was aware that he would not be there for her critical years of high school.

Approach of the learned sentencing judge

[201] The learned sentencing judge referred to the fact that the pleas of guilty were timely, and saved time and money to the community. They also saved the

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169 AB199 p 35.

embarrassment, humiliation and stress of the complainants' having to give evidence. His Honour then characterised the relevant features in this way:[170]

(a) the offending was appalling behaviour to people who had trusted the appellant and relied on him to protect them and care for them;

(b) the appellant had a predilection towards that type of offending;

(c) he accepted that the appellant had a terrible childhood and experiences as a child where he was abused;

(d) the offending conduct in relation to ADL was persistent, progressing to the point of actual intercourse;

(e) it was accepted that the assault against SWS arose in circumstances where there was an argument and the appellant intervened;

(f) the learned sentencing judge did not accept that the appellant was not an active participant in the offence against MGA;

(g) in totality the conduct was "truly appalling behaviour", and the fact that the offences occurred over a variety of ages indicated "the extent of your depraved attitude to those who should trust you";

(h) the appellant's personal background and his suffering as a child were factors to take into account, as well as his reasonably good work history;

(i) the police interview suggested a lack of remorse, explained by what was a complete lack of insight into the inappropriateness of his behaviour;

(j) the sentence had to reflect a just punishment, conditions to assist in rehabilitation, personal and general deterrence, as well as denunciation and protection of the community; and

(k) the totality principle was taken into account, with the sentence reflecting the overall criminality, as well as the 942 days which had been served in custody; though that time could not be declared, the learned sentencing judge took it into account when fixing the sentences of imprisonment, and also the non-parole period in respect of the Commonwealth offences.

[202] The learned sentencing judge imposed six years' imprisonment for the Commonwealth offences[171] and eight years' imprisonment on counts 10, 11 and 12. In respect of the assault on SWS, his Honour imposed 12 months' imprisonment. In respect of the indecent treatment of MGA[172] his Honour imposed two years' imprisonment. However, his Honour decided not to impose the two-year sentence cumulatively on the others as that would have placed the appellant in the position when he would have been subject to having to serve 80 per cent of the term imposed. His Honour said that he did not do that because the appellant had served two years and seven months in custody which could not be declared. To properly reflect the time served in custody his Honour considered it appropriate to make the sentence concurrent, not cumulative. As a result the overall head sentence was eight years.

[203] In setting a parole eligibility date the learned sentencing judge had regard to the overall offending, the need for deterrence, the need for balanced rehabilitation, and

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170 AB199 pp 46-47.

171 Counts 2, 6, 8 and 9 on indictment 757/15.

172 Indictment 562/16.

the time already served. His Honour set 30 June 2019 in relation to the Commonwealth offences as the relevant date. That meant an effective non-parole period of five years and seven months.

Discussion of the submissions by the appellant

[204] Given the wide-ranging and poorly focused contentions raised by the appellant, it is convenient to set out the relevant ones and the consideration of them at the same time.

[205] Further, whilst a variety of matters were raised in the application for leave to appeal, the submissions on those matters were contained in what might be called an outline but which comprised documents in the form of eight "affidavits".[173] The matters dealt with below are taken from that "outline".

[206] The overarching submission made was that the sentences were manifestly excessive and crushing. The context in which the submission was made appeared in the appellant's Affidavit #1:

> "It is my firm belief that my wife (of 30 years) and daughter (now 19 years of age) will welcome an opportunity to pursue remedy, reconciliation and harmonious reunion as soon as possible, and your dedicated, compassionate and favourable consideration to this Petition will allow for that to begin; our daughter's emotional stability, future educational and personal development prospects will, I believe, to a significant degree depend upon it."[174]

[207] That theme was pursued from time to time by the appellant in his submissions. By way of example, he referred to his "pursuit of a *Germane Rectification* that will help me bring remedy, reconciliation and restructure to the tragic disintegration that has been brought upon my family, and for which I will be eternally repentant and remorseful".[175]

[208] The appellant contends he was initially refused bail in the Magistrates Court on spurious grounds, making it impossible for him to adequately prepare his defence. There is nothing in this point. The appellant admitted serious sexual offending during his police interview. There were admissions in relation to the offences against MGA and DAU, though not in relation to ADL. Given what he said in his police interview the fact that he was remanded in custody could not be seen to be on spurious grounds. At his sentencing the appellant was legally represented and it was then more than two years since he had been remanded. The remand period was taken into account on the sentence. The extracts of the instructions to his legal representatives, and his complaint that they were not adequately followed, puts the lie to the suggestion that he could not adequately prepare.

[209] The appellant contends his guilty pleas were not "aptly credited". The learned sentencing judge expressly referred to them, said that they would be taken into account; and they were.

[210] The appellant contended that his full co-operation with police from day one was not credited at all. That submission cannot be accepted. The agreed facts included that

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173 Entitled Affidavit #1 – Affidavit #8.
174 Affidavit #1 paragraph 03.
175 Affidavit #3 paragraph 02.

the appellant declined to be interviewed about the assault against SWS.[176] It is true that in his police interview he gave details of the offence against MGA, but declined to respond to the allegations of offences in respect of ADL. His co-operation with police could hardly be described as "full co-operation".

[211] The appellant contended that the pre-sentence custody was excluded. That is not the case as the full period of about two years and seven months was expressly taken into account.

[212] The appellant contended that his Defence Counsel presented "inadequate supporting argument relating to significant mitigating circumstances". I cannot accept that submission. The appellant was represented at the sentencing hearing by Counsel extremely experienced in criminal matters. The various exhibits put in as part of his outline[177] demonstrate that his Counsel was provided with considerable material, not all of which went to mitigating circumstances. Counsel plainly made a tactical decision as to what circumstances should be put forward, and how. His personal circumstances, including his own history of abuse, were highlighted as well as the contention that, apart from what he did, he was a devoted father to ADL. In the light of the statements made by him in his police interview, the complete lack of remorse[178] and general lack of insight into his offending, it is difficult to see what else might have usefully been said.

[213] The appellant complained that he had been given assurances by his lawyers that he could expect a non-custodial sentence in respect of the assault against SWS, and probably a fine. Assuming that to be so, it does not take matters anywhere. There is no suggestion that his legal representatives gave him some sort of binding assurance, nor is it suggested that he was induced to enter a plea of guilty because of some such assurance. The appellant plainly understood that he was pleading guilty to other offences to be heard at the same time. Ultimately, the sentence to be imposed was one for the learned sentencing judge. In the end, the sentence on that offence was ordered to be served concurrently with the very much larger sentences on the more serious offences. The complaint made is of no moment.

[214] In respect of the offence against MGA, the appellant contended that his lawyers advised him that because of the fact that the offence was committed a long time ago, and his passive involvement, a small custodial sentence was possible but improbable. Even accepting that such advice was given, there is no suggestion that it was given in the form of an absolute assurance, nor that the guilty plea depended upon it. That plea was given at the same time as guilty pleas to a variety of other offences which were likely to attract a greater sentence.

[215] In respect of the offences against ADL, the appellant contends that he was told by his legal representatives that he would not receive a custodial sentence in excess of five years and that it should be concurrent with other sentences, with pre-sentence custodial time allowed. It is also suggested that his lawyers told him that with the pre-sentence custodial time included, he might get a suspended sentence or immediate parole. There is reason to doubt that anything of the kind was said to the appellant. His very experienced Counsel made a submission that the appropriate

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176 AB199 p 55.

177 Both in respect of the application for leave to appeal against sentence as well as his appeal against conviction.

178 Unless it was reflected in the pleas of guilty.

global penalty for all the offences was of the order of eight years.[179] Further, his counsel made a submission that a non-parole period should be set at two and a half years.[180] In any event, there is nothing in what the appellant suggests that would lead to the conclusion that it affected his decision to enter a plea of guilty. The appellant has put a deal of material in about the instructions that he gave his lawyers, and the basis upon which he would plead guilty. None of that indicates that the likely penalty was a determining factor. Finally, it has to be recognised that the sentence to be imposed was unquestionably a matter for the learned sentencing judge. All that Counsel might do is indicate their own view of a likely outcome, but they cannot give an assurance.

[216] The appellant complains that the police improperly retained his computer for a period of two and a half years. He asserted that the computer held evidential material of value to the defence case. When the computer was eventually returned "a significant amount of relevant data had evidently been deliberately removed". That led to the contention that he was denied an opportunity to assemble pertinent supporting evidence and to test the evidence. It is difficult to see what relevance this complaint has. The fact is that the appellant entered a plea of guilty to the offences. It is not at all clear whether any missing data could have assisted in assembling pertinent evidence or testing evidence. Ultimately, the facts were agreed.

[217] The appellant contended that the assault charge was adjourned at least 16 times between December 2013 and April 2015 whilst he awaited conclusion of other matters. As a result, the delay was an arbitrary and unjust penalty imposed upon SWS and particularly ADL, whose progression through university and in classical music was hampered because she was denied his support. This was a matter not raised at the sentencing hearing. In any event, it is of doubtful weight. One of the complaints in his appeal against conviction was that SWS gave evidence that she was in the process of divorcing the appellant. Given that fact, it is doubtful that the delay in being sentenced on the assault charge had any impact at all. As for ADL, the evidence before the learned sentencing judge was that she no longer lived with SWS, but was living independently, running a household, working and completing her final year of school.[181]

[218] The appellant also contended that he was not aware that there was a further charge of assault until mid-2014, and because of it he was rendered "totally incommunicado with his family". I am unpersuaded this has any relevance. The appellant had been charged in respect of very serious charges quite apart from the assault charge and was held in custody in respect of them. I cannot understand how there is a legitimate complaint relating to an additional charge.

[219] The appellant contended that his agreement to enter a guilty plea in order to let the complainants' avoid the embarrassment, humiliation, stress and mental pressure of giving evidence at a trial, demonstrated remorse, concern, consideration and empathy on his part. The appellant's submission ignores the fact that the learned sentencing judge identified that the guilty pleas resulted in a significant saving whereby the various complainants were not required to give evidence. To suggest that it demonstrated remorse, concern, consideration or empathy is misplaced. In his police

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179 AB199 p 37 lines 23-29.
180 AB199 p 43 line 33.
181 AB199 p 28 lines 30-34.

interview he had admitted his involvement in the offence against MGA, alluded to the assault on SWS and said nothing about the offences against ADL. The offences were brought on the basis of statements by MGA, ADL and SWS. The agreed statement of facts make it plain that the appellant admitted the offences against ADL. In light of those facts the pleas of guilty indicate an acceptance of guilt, but little else.

[220] The appellant contended that the learned sentencing judge should have been told, in relation to the assault charge, that it had arisen as a result of him protecting ADL from SWS. There is nothing in this contention. Whilst it may not have been emphasised that he was trying to protect the adopted daughter from violence on the part of SWS, the sentencing judge was told that the assault occurred whilst the appellant was intervening in a fight between the two of them, which had been going on for some time.[182] More detail than that was unnecessary.

[221] The appellant contended that the statement of facts concerning his assault on SWS contained a statement which was "verifiable fabrication". This was in respect of the last line of it which stated: "On 1/12/13, the defendant declined to participate in an interview about this matter". The appellant pointed to his record of interview where he referred to conflict arising between SWS and ADL.[183] There is nothing in this point. The appellant's interview with the police was on 2 December 2013 and in it he said nothing about the assault on SWS. The statement of agreed facts said that he declined to give an interview on 1 December 2013. Those facts were agreed, no doubt on instructions, at the time of the sentencing. There is no basis to conclude that there is any fabrication in them or (as the appellant contended) duplicity.

[222] The appellant also contended, in relation to the assault charge, that no precedents were offered to the learned sentencing judge and therefore the sentence in respect of it (12 months' imprisonment) was said to be excessive. There is nothing of any substance in this point. The sentence for that offence was, on any view, always going to be dwarfed by the sentence imposed on the other offences. Totality considerations meant that it was always likely that one of the other charges would be selected as warranting a head sentence reflecting the overall criminality. It was never going to be the assault charge. As it was, the Crown submitted that offence would attract "a short cumulative sentence".[184] The learned sentencing judge told the appellant's Counsel that he had the intention to impose 12 months' imprisonment for that offence.[185] The appellant's Counsel did not contend to the contrary.

Indictment 562/16 – offence against MGA

[223] The appellant contended that the learned sentencing judge should have sentenced him on the basis that only SWS was an active participant in that offence. There is nothing in this point. The statement of facts accepts that he may have given the instruction to MGA about where to put his penis, that it was he who took MGA into the bedroom where SWS was naked, and that he may have given the suggestion that MGA remove his clothes. The learned sentencing judge was, with respect, perfectly entitled to reach the conclusion he did.

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182 AB199 p 36 lines 4-7.
183 AB199 pp 90-93 and 101.
184 AB199 p 32 line 25.
185 AB199 p 8 line 2.

[224] The appellant contended that the learned sentencing judge was "prejudicially influenced" by the fact that there were two additional charges on the indictment, with which the Crown did not proceed. The point only has to be stated to understand that it is misplaced. The learned sentencing judge sentenced in respect of the outstanding charges and not on those discontinued.

[225] Exhibit #8 contains extracts of instructions that were given to the appellant's lawyers but which, he contends, were ignored. Much of it concerns a critique of the statements that were given by SWS and MGA to the police. Insofar as it refers to what was in their statements it is clear that they went further than the agreed statement of facts, and would have portrayed the appellant as having a greater involvement than the learned trial judge was told.[186] Exhibit #8 shows that the appellant gave a different version, which was that he found MGA and SWS both naked on the floor, MGA on his back and SWS leaning over him, and "it was pretty obvious what she was doing".[187] However, the statement of facts was expressly agreed, and was a reasonable attempt to minimise the appellant's involvement. It followed what the appellant had told the police in his interview. In the circumstances, the factual basis upon which the appellant was sentenced was as good as he could have achieved.

[226] The appellant contended that the two year sentence was disproportionate and the learned sentencing judge did not adequately consider comparable cases presented by the defence. I do not consider there is anything in this point. The Crown Prosecutor submitted that the sentence should be higher than 18 months and "perhaps around the two year mark", if the appellant was being sentenced for that offence alone.[188] Subsequently, the learned sentencing judge indicated to Defence Counsel that three years' imprisonment might be appropriate.[189] That was considered by Defence Counsel over an adjournment, after which she referred to comparable cases supporting the submission that three years was too high, but that she was "constrained by the whole picture, particularly my client's interview".[190] In the circumstances, the sentence of two years was one which was in general accord with the submissions of both sides.

[227] The appellant contends that he was told by his lawyers that it was improbable that he would be sentenced to actual custody for that offence. I doubt that could really be the case, but accepting it to be so, it had no discernible impact upon his decision to enter a plea of guilty and, given that he was pleading guilty to other very serious offences, it has no impact on the overall sentence. Indeed, the learned sentencing judge made it plain that but for the two years and seven months which had been served in pre-sentence custody, he would have made that sentence cumulative, with the result that the appellant would have to serve 80 per cent of the overall sentence. The learned sentencing judge did not do that, which was something favourable to the appellant.

[228] The appellant refers to the sentence imposed on SWS for the same offence. He suggests that there is something disproportionate about the sentence she received and the sentence he received. Her sentence was one of two years' probation with no

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186 One example is that SWS said he was pushing on her back and MGA said that the appellant pushed his head down.

187 Exhibit #8 p 4.

188 AB199 p 31 line 43 to p 32 line 7.

189 AB199 p 38 line 4.

190 AB199 p 41 line 15.

conviction recorded. There is an obvious disparity. However, when one remembers that her sentence proceeded under s 13A of the *Penalties and Sentences Act* 1992 (Qld), and that she was not charged with any other offence whatsoever, the disparity ceases to be one of significance. It certainly does not demonstrate that the sentence imposed on the appellant was manifestly excessive.

Indictment 757/15 – offences against ADL

[229] The appellant contends that there was an error in the fact that the entirety of his police interview was tendered when only part of it was concerned with the offence against MGA, and it contained passages about offences against DAU which were not then the subject of any charges. It was contended that there was significant prejudicial influence on the learned sentencing judge, which led to a manifestly excessive sentence. I reject that contention. It is true that the entirety of the police interview was tendered as Exhibit 5. However, the Crown Prosecutor told the learned sentencing judge that she would take him to "the relevant portions".[191] She then did that, confining herself to pages 18-19,[192] pages 37-38,[193] and pages 41-42.[194] The learned sentencing judge was not directed to the passages concerning what the appellant had said about his sexual conduct with DAU.

[230] Further, it is the case that the learned sentencing judge was not directed to pages 7-10 of the police interview, which dealt with the occasion of offending against MGA. However, there was nothing in that omission, as the agreed statement of facts closely reflected that passage.

[231] There is, in my respectful view, no reason to think that the learned trial judge went beyond the passages to which he was directed, and no reason to think that there was any prejudicial influence upon his consideration from passages to which he was not referred.

[232] The appellant contended that he was told by his lawyers that a concurrent head sentence of up to five years, with pre-sentence custody included, would be within the region of logical expectation.[195] I referred earlier to similar assertions in respect of the other offences. The same factors apply here. Even if such a statement was said it was hardly an assurance and there is nothing to suggest that the plea of guilty was induced by it. Indeed, Exhibit #8 submitted by the appellant records his lawyers being instructed that the last thing he wanted was for ADL to be made to suffer through a trial process and that therefore he would offer no contest in relation to those charges.[196] Further, it has to be recalled that when the appellant's Counsel proffered the submission for an eight year head sentence, it was as a global sentence and not simply for the offences against ADL.[197]

[233] In the circumstances it is doubtful, in my view, that there was the suggested turnaround which the appellant contends. In any event, he does not seek to set aside his plea of guilty nor suggest that he was induced to give it in the first place by some misrepresentation.

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191 AB199 p 27 line 25.
192 Which dealt with MGA being left in his care.
193 Which dealt with the appellant's recitation of the power compelling him to sexually abuse.
194 Which again was the appellant's recitation of the uncontrollable urges he felt and his consequent risk to the community.
195 Exhibit #3 paragraph 23. Elsewhere the appellant asserted that he was told he would not receive more than five years' imprisonment.
196 Exhibit #8 pp 7-8.
197 AB199 p 37 lines 23-33.

[234] The appellant contends that: the sentence imposed upon him is crushing, on himself and on his immediate family; that he was being denied contact with SWS and ADL; there was no ongoing animosity between them, and he should be allowed to make contact with SWS and ADL; and his incarceration had left ADL without his support. To support this the appellant proffered his Affidavit #5[198] in which he advanced various contentions to the effect that he was always a gentle, adoring and dedicated father to ADL, and that he was tirelessly devoted to advancing her prospects, and that the family should be permitted to be reunited. One passage of note from Affidavit #5 is as follows:

> "To that ideal happy end, once reunited with his family – and when in a non-custodial position to do so – *The Appellant* is genuinely eager to undertake appropriate, dedicated and specialised professional therapeutic and remedial intervention that is sympathetic to his historical origins, and with a view to addressing, and ultimately eliminating, certain relevant core issues to ensure the future happiness and contentment of all concerned."[199]

[235] That passage underlines what, in my view, is plain, namely that the appellant lacks insight into the impact of his offending, lacks remorse with respect of what he has done, and entertains a delusional view as to the future with the very people he abused. ADL's victim impact statement[200] makes it plain that she has suffered significantly as a consequence of the appellant's offending against her. That is not the least surprising. Given the fact that the appellant evidently groomed her from an early age to become used to sexual assaults by him, it is surprising to say the least that the appellant should entertain the views he does. In any event, his statement does recognise the need for professional help in overcoming the "certain relevant core issues" which, in the circumstances, can only be a reference to the overwhelming urges he feels or has felt towards offending against young girls.[201]

[236] That there is a financial impact through the appellant's inability to support his family whilst imprisoned could not be a factor which overrode all of the other sentencing considerations, particularly in the light of the extremely serious offences of which he was convicted. In any event, by the time the sentencing hearing occurred the appellant had been in custody for two years and seven months and by then, as the Crown Prosecutor told the learned sentencing judge, ADL had progressed to a point of living independently.

[237] The remaining relevant contention raised by the appellant is the proffering of what he refers to as an "Undertaking". In summary, he seeks to provide:

(a) intelligence that will assist drug enforcement agencies with the "war on Ice", including the identity of methylamphetamine producers and suppliers;

(b) to provide intelligence to the Department of Social Security in relation to its efforts to eliminate benefits fraud; and

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198 Entitled 'General Family Overview'.
199 Affidavit #5 paragraph 13; emphasis in original.
200 AB199 p 105.
201 Expressed graphically in his police interview.

(c) to set up a system by which he can provide ongoing financial support and development assistance to a select group of homeless families to restore their dignity and security.[202]

[238] Little time needs to be spent considering this proposal. Firstly, it was not a matter raised before the learned sentencing judge. Secondly, it is not a matter that concerns the Court. If there are arrangements that can be made which might attract some benefit from enforcement agencies, they are not matters which the Court entertains in advance. Thirdly, there is no evident substance to the proposal and, certainly insofar as the proposal is to support certain homeless families, it is entirely improbable given that the appellant is incarcerated. Fourthly, the sentencing process, both at first instance and before this Court, is not a bargaining process of the kind the appellant proffers.

Comparable cases – manifest excess

[239] The appellant contended, by reference to a number of cases, that the sentences imposed were manifestly excessive.[203] Where manifest excess is the issue, the question is not whether the particular sentence was severe, or whether a more lenient sentence may have been imposed.[204] It is well established that comparable cases do not mark the outer bounds of a permissible sentencing discretion with numerical precision.[205]

[240] To succeed on an application based on manifest excess, it is not enough to establish that the sentence imposed was different, or even markedly different, from sentences imposed in other matters. It is necessary to demonstrate that the difference is such that there must have been a misapplication of principle, or that the sentence is "unreasonable or plainly unjust".[206] Consistently with the accepted understanding that there is no single correct sentence, judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies.[207]

[241] For the Crown, Ms Wooldridge referred to a number of comparable cases, submitting they might be of assistance. They fell into four convenient categories. In relation to the Commonwealth offences reference was made to *Lee v The Queen*,[208] *R v Martens*,[209] *R v ONA*[210] and *Merrill (a Pseudonym) v The Queen*.[211] For cases where incest occurred in the course of a period of offending, reference was made to *R v LJ*,[212] *R v LP*,[213] *R v KN*,[214] and *R v BBM*.[215] Reference was made to *R v B*[216]

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202 Affidavit #3 paragraph 28; Affidavit #4.

203 The authorities he referred to were *R v T* [1998] QCA 206; *R v Tichowitsch* [2006] QCA 569; *R v M* [2003] QCA 556; *R v BG* [2000] QCA 42; *R v ELS*; *ex parte Attorney-General* [2004] QCA 111; *R v Barker*, unreported, Judge Rafter SC, 19 March 2012; *R v Martens* [2007] QCA 137; *R v Wilson*, unreported, Judge Dick SC, 24 November 2016; *R v MBZ* [2014] QCA 18; *R v MCD* [2014] QCA 326.

204 *R v Jackson* [2011] QCA 103 at [25].

205 *Barbaro v The Queen* (2014) 254 CLR 58 at [41]; [2014] HCA 2; *Hili v The Queen* (2010) 242 CLR 520 at [54]; [2010] HCA 45; *R v Heckendorf* [2017] QCA 59 at [21].

206 *Hili v The Queen* at p 538-539 citing *Wong v The Queen* (2001) 207 CLR 584; [2001] HCA 64.

207 *Markarian v The Queen* (2005) 228 CLR 357 at 371; [2005] HCA 25.

208 (2000) 112 A Crim R 168; [2000] WASCA 73.

209 [2007] QCA 137.

210 (2009) 24 VR 197; [2009] VSCA 146.

211 [2017] VSCA 189.

212 [2004] QCA 114.

213 [2005] QCA 266.

214 [2005] QCA 74.

215 [2008] QCA 162.

which was a case of more isolated offending involving incest. Finally, as to indecent treatment offences, reference was made to *R v Wruck*[217] and *R v WBB*.[218]

[242] In relation to the Commonwealth offences one must note that there was an increase in the maximum penalty in 2010.[219]

[243] I do not need to refer to all the cases. The following will suffice.

[244] *Lee* was a sentence imposed after a trial where the effective total sentence was 14 years' imprisonment with a non-parole term of six years. The offender there was convicted of: one count of sexual intercourse with a child under 16, outside Australia; eight counts of indecency on a person under 16 outside Australia; and 14 counts of being in possession of pornography plus 15 counts concerning child pornography. A sentence of eight years' imprisonment was imposed in respect of the count involving sexual intercourse, four years' imprisonment in respect of the eight counts of indecency and two years in respect of each of the remaining counts. On appeal the court held that six years was more appropriate in respect of the single act of sexual penetration. In respect of the eight offences of indecency, the four year terms were reduced to two years, but cumulative upon the six years for sexual penetration. The effective sentence, after appeal, was therefore eight years.

[245] *Lee* was a less serious case than that of the appellant. The single act of sexual intercourse was consensual and did not involve any breach of trust. The indecency charges consisted of taking photographs of naked girls, one instance of which involved chopsticks inserted into the genitals of one of the girls. None of those offences involved the direct physical contact which was the hallmark of the appellant's offending. In the circumstances, *Lee* supports the sentence imposed on the appellant, even allowing for the fact that the appellant's sentence was on a plea whereas *Lee* was as a result of a trial.

[246] *Martens* involved a mature offender (56 years old) with no criminal history. He had sexual intercourse on one occasion with a 14 year old girl. He did not co-operate with the administration of justice and showed no remorse. His conduct was exploitive, predatory and despicable. At trial he was sentenced to five and a half years' imprisonment. That summary is enough to demonstrate it was a case very much less serious than that of the appellant. By reference to it the six years imposed for the Commonwealth offences of the appellant (involving a single act of sexual penetration as well as other indecency offences) could not possibly be said to be manifestly excessive.

[247] Each of *ONA* and *Merrill* were cases of a single act of sexual intercourse with a child outside Australia. Each was a plea of guilty and in *Merrill* the sentence of five years and three months was not altered. Similarly in *ONA* the sentence of six years was not altered. Each of them supports the conclusion that the sentence imposed on the appellant in respect of his Commonwealth offences was not manifestly excessive.

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216 (2000) 111 A Crim R 302; [2000] QCA 42.
217 (2014) 239 A Crim R 111; [2014] QCA 39.
218 [2015] QCA 152.
219 See *R v CDI* [2013] QCA 186 at [19].

[248] The sentence imposed in *BBM* also supports that imposed for the Commonwealth offences in this case. The convictions in *BBM* were imposed after a plea of guilty to one count of maintaining and eight counts of incest. The victim was the adopted daughter of the offender and aged between eight and 15 for the maintaining charge, and 17 and 21 for the incest charges. She had various disabilities and had been adopted at three years old. The offender was between 48 and 59 at the time of the offences and 63 at the time of sentence. Originally sentences of 10 years had been imposed on the incest charges, but they were reduced on appeal to seven years. The reduction was because of mitigating factors including the offender's personal circumstances and medical conditions, his remorse and the fact that personal deterrence was not a significant factor. That recitation is sufficient to demonstrate the utility of *BBM* in supporting the sentences imposed.

[249] *LJ* involved offending against a child under 12. The sentences were imposed after conviction at a trial on six counts of indecent dealing, seven counts of incest, one count of assault occasioning bodily harm and one count of sodomy. All offences were committed against the daughter of the offender. The offending started when she was seven and continued until she was 12, when full sexual intercourse occurred. The offender was 59 at the time of sentence and between 20 and 30 when the offences were committed. He had no prior convictions and a good work history. The head sentence imposed was 14 years on the first of the incest counts, with lesser sentences on the other counts. That sentence was not modified on appeal. Given that the 14 year sentence was imposed on a trial, *LJ* lends support to the eight year sentences imposed in this case.

[250] *KN* involved an offender who pleaded guilty to charges of maintaining a sexual relationship with a child, seven counts of incest and two counts of indecent dealing. On the maintaining charge he was sentenced to eight years' imprisonment, and four years' imprisonment on each of the incest counts. The victim was his step-daughter and the offending occurred between when she was nine and 12, with the first count of incest occurring after she was 12. This court did not interfere with the sentences, observing that they were at the lower end of the discretionary range. The eight year sentence was imposed on the maintaining charge, but in order to reflect the overall criminality of the offending. Therefore *KN* supports the imposition of the eight year sentence in this case.

[251] In respect of the indecent treatment offences it is sufficient to note that *Wruck* and *WBB* lend support to the sentences imposed in this case. There is no need, in my view, to analyse them in any depth given that the sentences on those charges were wholly subsumed by the sentences imposed on the more serious offences.

[252] I do not consider that any of the authorities referred to by the appellant compels the view that the sentences imposed upon him were manifestly excessive. *ELS*[220] concerned facts quite distinct from the current case, a much older victim and was an Attorney's appeal. It therefore gives little comfort. *BG*[221] only involved two counts of incest and no other offences. All it establishes is that a six year sentence was not manifestly excessive. The single judge decisions referred to are of limited utility given there are authorities from this Court which are more pertinent.

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220 *R v ELS; ex parte Attorney-General of Queensland* [2004] QCA 111.

221 *R v BG* [2000] QCA 42.

[253] The application for leave to appeal against the sentences imposed in CA 199 of 2016 should be refused.

Application for leave to appeal against sentence – CA 59 of 2017

[254] Although the offending conduct the subject of these convictions occurred first in time, the trial and sentences imposed in CA No. 59 of 2017 occurred after the sentences imposed in CA 119 of 2016.[222] That therefore presented a different scenario for the learned sentencing judge, at least because by then the appellant had a serious criminal history for similar offending. Further, the sentences to be imposed in CA 59 of 2017 were in respect of convictions after a trial, not on a plea of guilty.

[255] The circumstances of the offences have been dealt with in some detail in the reasons above dealing with the appeal against conviction. There is no need to repeat them.

The approach of the learned sentencing judge

[256] The learned sentencing judge recorded the overall offences in respect of which the appellant had been found guilty. His Honour summarised them as being: two counts of rape; one of indecent treatment of a boy under 14; one of indecent treatment of a girl under 17 and under 12, one of attempting to commit an unnatural offence; two of indecent treatment of a girl under 16 and under 14; and three counts subject to the pleas of guilty, of indecent treatment of a girl under 16 and under 14.

[257] The learned sentencing judge found that the two rape counts were the most serious. He characterised the first of them as involving a degree of persistence, describing the reaction of DAU when it occurred and that she was only four years of age. The second count, when she was eight or nine and in the car, also showed persistence.[223]

[258] The learned sentencing judge described in short detail the nature of the offending on the other counts. His Honour then set out the matters he took into account:

(a) the offences were serious and abhorrent;

(b) the offences were against young children, being his own son and daughter;

(c) it involved a grave breach of trust;

(d) the offending was carried on for the appellant's own sexual gratification;

(e) counts 1 and 5 (the rape counts) involved an element of persistence and threats;

(f) the offences had had a marked effect on the victims, reflected in the victim impact statements;

(g) the police interview recorded limited admissions, but showed little remorse and a degree of blame attributed to the complainants;

(h) most of the charges were denied and the appellant's history showed a lack of rehabilitation; no submission about rehabilitation was pressed on the appellant's behalf;

(i) he had a good work history;

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222 Those were the offences against MGA, ADL and SWS.

223 AB 207.

(j) the extent of the limited co-operation and also the fact that pleas of guilty were entered to three counts, though those pleas were to lesser offences and would have been difficult to contest given the police interview;

(k) the appellant had a sexual interest in children, evident from the offences for which he was to be sentenced, and for those in respect of which he was serving a term of imprisonment;

(l) the appellant's difficult childhood which included being sexually abused himself; and

(m) the necessity to impose a sentence that reflected just punishment, deterrence, denunciation and the protection of the community.

[259] The learned sentencing judge recognised that the existing terms of imprisonment were for sexual offences which had occurred after those that he was dealing with. His Honour described that as a "complicating factor".[224]

[260] His Honour set out the sentences which had been imposed, being an effective sentence of ten years and seven months with parole eligibility set at 30 June 2019. His Honour recorded the submission that the appellant's serving custody had been harder than for others because he had been the victim of some violence in custody and had been placed in protective custody. His Honour also noted that at 69 the appellant's age also made his custody a little harder than for others, though there was no contention that he was otherwise than in reasonable health.

[261] The learned sentencing judge recorded that both sides were agreed as to the proper approach to be taken in the sentencing. That was that the sentence to be imposed should take into account what would have been an appropriate sentence had the appellant been dealt with for all matters at the time when he first went in to custody on 29 November 2012. To achieve that both sides agreed that the sentence on the rape counts should be concurrent, as well as lesser concurrent sentences on the other counts. His Honour indicated he would take that course.[225]

[262] The learned sentencing judge referred to the fact that the appellant had "proved to be a serial offender, now caught out late in life after decades of abusing various children".[226] His Honour adopted, as both sides had recognised, the statement of principle in *R v Turnbull*:[227]

> "Account must be taken of the number of episodes and the number of victims because a serial rapist without a prior criminal history is, in some respects, similar to a rapist who has previously been sentenced for rape and served that sentence. One difference is that in the latter case, there is a strong case for a protective sentence because the previous sentence has not been effective to personally deter the offender."

[263] The learned sentencing judge then noted the salient features of the previous sentence imposed in 2016, including the description of that offending as appalling behaviour to people who trusted the appellant, and relied on him to protect them. His Honour then said:

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224 AB 208.
225 AB 208 lines 39-43.
226 AB 208 line 47.
227 [2013] QCA 374 at [49].

> "When the offending for which I am dealing with you is seen in the context of that offending, it can be seen that you have been an abuser of children in respect of whom you were in a position of trust over a period of four decades."[228]

[264] The learned sentencing judge referred to two of the comparable cases to which he had been directed, *R v CAP*[229] and *R v K*[230]. Having reviewed the circumstances of those two authorities the learned sentencing judge expressed the view that the appellant's case was somewhat more serious than *R v K* and therefore *R v K* did not provide the basis for a lesser effective sentence of 15 years, as was contended by Counsel for the appellant. His Honour also concluded that the appellant's offending was not quite at the same level as in *R v CAP*, upon which the Crown relied to suggest an effective protective head sentence of 20 years.

[265] The learned sentencing judge concluded:

> "Ultimately, I have decided that it would be appropriate to fashion a sentence on the basis that had you been dealt with for these matters as well as the matters which were dealt with by Justice Boddice at the time that you were first put into custody, that the head sentence would have been 18 years."[231]

[266] The learned sentencing judge then had the assistance of both counsel in working out the appropriate calculations to achieve that result. The consequence was the sentence of 14 years and eight months imprisonment on counts 1 and 5, and the lesser terms referred to in paragraph [18] above.

Discussion of the appellant's submissions

[267] As with that part of the reasons dealing with the sentence on CA 119 of 2016, the nature of the appellant's contentions make it convenient to deal with the consideration of them at the same time.

[268] The first thing to note about the sentence is that the general approach, that is to say, fashioning a sentence on the basis that it dealt with all matters from the time the appellant first went into custody, was one agreed by both the Crown and Counsel for the appellant. Secondly, Counsel for the appellant contended that such an approach would arrive at an effective sentence of 15 years. The opposing submission by the Crown was that the effective head sentence would be 20 years. The sentence ultimately imposed was an effective period of 18 years, and therefore falling between the opposing contentions.

[269] One further matter to note is that because of the date of the offending conduct, the serious violent offence regime under Part 9A of the *Penalties and Sentences Act* 1992 (Qld) did not apply. In light of that the Crown submitted that the appellant should serve "at least half" of the resulting overall period of imprisonment relating to both sentences.[232] Counsel for the appellant agreed with the general approach

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228 AB 209 lines 32-34.
229 [2009] QCA 174.
230 [1998] QCA 193.
231 AB 211 lines 37-40.
232 AB 190 line 28. That is consistent with the agreed approach, namely that the sentence should be structured to commence at the time the appellant went into custody.

advocated by the Crown.[233] There was therefore no dispute that the appellant would be required to serve approximately half of the total effective sentence.[234]

[270] Many of the appellant's contentions on this sentence reflected those made in respect of the other sentence imposed in 2016. Where that is the case it is therefore only necessary to deal with them in fairly short order.

[271] The appellant contended that during his period of detention prior to the sentencing he had been totally co-operative, yet none of that had been given credit.[235] I do not consider there is much in this point. The appellant's Counsel made submissions about co-operation[236] but accepted that it was only limited. The appellant's time in prison had been served in protective custody and he had been subject to assaults.[237] Nothing more was said about the nature of his behaviour whilst in custody, so it could hardly be a criticism of the learned sentencing judge that he said no more than he did.

[272] The appellant contended that appropriate credit was not given for his guilty pleas. That is not sustainable as the learned sentencing judge expressly referred to them and indicated he would take them into account.

[273] The appellant contended that he gave his lawyers an historical overview of his own extensive childhood sexual abuse, which was not provided to the court. I do not consider this to be a justifiable complaint. The learned sentencing judge had the benefit of the sentencing reasons from Boddice J and was, himself, addressed about the sexual abuse which commenced when he was a very young child. That abuse was referred to as a particular factor in the sentencing reasons. It can be safely assumed that the appellant's Counsel made a choice about how, and to what extent, he referred to that history. I am not persuaded that greater detail would have made any difference whatsoever.

[274] The appellant contended that no consideration was given to the fact that he had been the subject of harassment and assault whilst imprisoned and that his age had an impact upon his wellbeing. That is unsustainable as the learned sentencing judge expressly referred to those matters in his reasons.

[275] The appellant contended that the learned sentencing judge was in error to suggest that he lacked remorse, and that his pleading not guilty for alleged offences of which he was innocent and pleading guilty to counts he did not contest, could not be said to be a lack of remorse. I do not accept that submission. The learned sentencing judge referred to the fact that the appellant showed "little remorse" in the context of the police interview. Ultimately, the appellant pleaded guilty to only three of the offences, contesting the rest and, as is now apparent by the submissions made to this court, he did so by instructing his solicitors that the complainants had fabricated the allegations against him. All of that demonstrates a lack of remorse.

[276] The appellant also contended that he was not a risk to the community and it was wrong to assume that he would be at some point in the future. The only reference by the learned sentencing judge was in his identification of the purposes for which

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233 AB 191 line 41.
234 AB 203 lines 18-22.
235 Exhibit #2 paragraph 11.
236 AB 198 lines 35-38.
237 AB 198 lines 17-19.

a sentence should be pronounced, including "protection of the community". His Honour made the point that there was a lack of rehabilitation and that no submission about rehabilitation had been pressed on his behalf. That, together with the offences of which he had previously been sentenced, and those for which he was then being sentenced, amply justified the learned trial judge's conclusion that the appellant displayed a sexual interest in children and was a serial offender caught out after a long period of abusing children. The learned trial judge was right to identify the need to protect the community as a relevant consideration in the sentencing process.

[277] The appellant next contended that, contrary to the instructions he gave his lawyers, the learned sentencing judge was not made aware of the significant disadvantages to ADL and SWS, they being described as "recently arrived immigrants relying on 'permanent resident visas' and (up to his arrest) his support". The appellant referred to the significant disadvantages they had faced since the appellant's detention and the real potential "for further tragedy to arise if all hope of timely return to family stability is lost to them".[238] The facts before the learned sentencing judge included the material tendered before Boddice J on his sentencing hearing. That revealed that the family moved back to Australia in 2012. They could therefore be hardly described as "recently arrived immigrants", even if they were relying on permanent resident visas. There was no material to suggest that their status as visa-holders put them at risk of deportation or, indeed, any other risk. True it is that they may have relied upon the appellant's support up to the time he was put into custody, but the quality of that support has to be seen in light of the offences that he committed. The balance of the appellant's submission in this respect carries little weight and can be dismissed.

[278] The appellant contended that well before the trial date he had offered to compromise on some counts on the basis that he was prepared to "conditionally enter a 'Convenience Plea' of guilty … in order to protect his children … from the rigours of their being required to testify at court".[239] It was said that the prosecutor rejected the offer. Even if all of that were true it has nothing to do with the question of whether the sentence is manifestly excessive or not.

[279] The appellant submitted under the heading "Considered Justifiable Convictions and Appropriate Revised Sentence Range" a revised sentence range for counts 2 and 3,[240] that counts 6 and 7 would remain at 18 months each, count 9 would not exceed two years and count 11 would remain at 12 months. All of these revised sentences were proposed on the basis that his convictions on counts 1, 4, 5, 9 and 12 would be overturned and those on counts 2, 3 and 9 would be "reclassified" as a "convenience plea" of guilty but without an admission of guilt.[241] Central to that submission was the appellant's proffering of what he called his "Undertaking". I shall now turn to that issue.

[280] The undertaking to which the appellant referred was that outlined in his Affidavit #4 in CA 199 of 2016. I need only set out its salient features:

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238 Exhibit #2 paragraph 19.
239 Exhibit #2 paragraph 22.
240 The proposed sentence was "equal periods not exceeding two years each".
241 Exhibit #2 paragraph 29.

(a) the appellant undertook to assist various authorities in their efforts to curb 'burgeoning criminal activity' and to facilitate the resettlement of a number of select homeless families;

(b) the proposal was to provide intelligence in relation to drug offending and benefits fraud and to work with a select group of capable and willing homeless families to get them restarted; and

(c) this was "all dependent upon the appellant being released from custody and being allowed to re-establish his own family".

[281] In Affidavit #4, the appellant extended that undertaking, saying that the ultimate goal is the establishment of a community orientated ongoing project to combat drug offending by providing a platform for people to "dob-in a drug dealer".[242] The appellant proposed a six-stage set of steps all dependent upon this court giving a decision recognising that "there are justifiable grounds for his grievances and pleas for timely intervention, redemption and 'conditional' suspension of sentence".[243] The stages contemplated a four month period after release during which time the appellant would concentrate re-establishing himself and reconciling with his family, but also "beginning a concerted professional remedial and healing approach in relation to that which was primarily responsible for the devastating crisis that engulfed him and his loved one". He would then liaise with drug enforcement agencies with a view to developing his proposed program.

[282] Stage three proposed the development of an online program to facilitate the overall program; stage four was the professional production of advertisements to promote the benefits of dobbing-in a drug dealer; stage five involved publications; and stage six, a proposal whereby indemnities would be granted in return for information.

[283] That review of the proposal is enough to demonstrate that it is removed from the reality of the application to appeal against sentence. It has nothing whatsoever to do with demonstrating that the sentence imposed was manifestly excessive. It has more to do with an attempt to bargain with the court to have convictions overturned, pleas of guilty converted into verdicts without guilt, and to achieve immediate release. It is the stuff of fantasy.

[284] In terms of comparable cases the appellant relied on the same authorities on this application as he did on the application in respect of CA 199 of 2016. They do not assist him.

[285] The Crown pointed to a number of decisions to which the learned sentencing judge was referred including *R v CAP*,[244] *R v Pont*,[245] *R v CC*,[246] *R v K*[247] and *R v HAP*.[248]

[286] *CAP* and *R v K* were the two decisions reviewed by the learned sentencing judge in the course of his sentencing remarks. *CAP* involved an offender who was 63 when sentenced and between 34 and 44 during the offences. On his own plea of guilty he was convicted of four counts of rape against his daughter, five counts of rape

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242 Affidavit #4 p 2.
243 Affidavit #4 p 3.
244 [2009] QCA 174.
245 [2002] QCA 456.
246 [2004] QCA 187.
247 [1998] QCA 193.
248 [2008] QCA 137.

against his nieces, four counts of carnal knowledge against the order of nature, and one count of assault occasioning bodily harm whilst armed. He was sentenced to 19 years' imprisonment in respect of the four counts of rape against his daughter, and 17 years' imprisonment on the five counts of rape against his nieces. His daughter was aged between seven and 17 years when the offences were committed against her, the last rape resulting in her becoming pregnant with her first child. The rape offences against his nieces occurred when they were aged nine, 11 and about 16. The act of anal penetration against his daughter was when she was aged between seven and 11, and those against his nieces when they were nine and 11.

[287] The offender had an extensive criminal history including offences of violence. The offending was described as being "obviously at a high level" and was characterised by a lack of co-operation and an absence of genuine remorse. The sentences were not interfered with by this court.

[288] In *CAP* reference was made to the decision in *R v H*.[249] That offender committed 37 offences against three children over a period of 16 years, and was sentenced to 17 years' imprisonment on a count of maintaining a sexual relationship with his daughter, the constituent offences occurring when she was aged between five and 15 years. He came to the attention of police after he had voluntarily participated in counselling sessions and made admissions, and thereafter co-operated with police and pleaded guilty. He had no prior convictions and his own background was one of child abuse. His offending was described on appeal as being "at the zenith of violation of trust and abuse of power". On appeal the sentence for the maintaining offence (reflecting the overall gravity of the offending) was not reduced. There was an adjustment to the concurrent sentences on certain rape, sodomy and incest charges, but it was the totality of criminal conduct that warranted the sentence of 17 years.

[289] On any view, acknowledging the particular difficulties of making a case by case comparison of quality and quantity of criminal behaviour,[250] the offending in *R v H* is not all that dissimilar to that in the present case, when the offending for which the appellant was sentenced by Boddice J and the current offending is taken together. That conforms with the approach agreed by both sides in respect of the current sentence. Therefore *R v H* lends support to the conclusion that the current sentences are not manifestly excessive.

[290] Further, acknowledging that the offending in *CAP* was more serious[251] the higher sentence in *CAP* lends some support to the sentence imposed in the present case. That is particularly so considering that *CAP* involved a plea of guilty, whereas here the sentences follow a trial. At worst, it does not demonstrate that the current sentences were manifestly excessive.

[291] I do not consider it necessary to refer to other cases cited as relevant. Given the particular approach which was agreed by both sides, that is to fashion a sentence on the basis that the appellant had been dealt with for all matters, for the current offences as well as those dealt with by Justice Boddice, and from the time he was first put into custody, the sentence imposed cannot be demonstrated to be manifestly excessive.

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249 [2001] QCA 167.

250 As was recognised in *R v H* at pp 10-11.

251 A view shared by the learned sentencing judge in this case.

[292] The application for leave to appeal against sentence should be refused.

Disposition

[293] For the reasons I have outlined above the appeal against conviction fails and the applications for leave to appeal against sentence should be refused.

[294] **PHILIPPIDES JA:** I agree with the orders proposed by Morrison JA for the reasons given by his Honour.